UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

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In the Matters of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 21, 2011

10:04 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: 1. Debtors' Objection to the Claim of Wilmington Trust Company as Indenture Trustee (Claim No. 10082) [ECF No. 20510]

Hearing re: 2. Debtors' One Hundred Thirty-Sixth Omnibus Objection to Claims (Misclassified Claims) [ECF No. 16867]

Hearing re: 3. Debtors' Motion for Authorization to Implement the Defense Costs Fund [ECF No. 22647]

Hearing re: 4. Application of the Debtors for Authorization to Employ and Retain Gleacher & Company Securities, Inc. as Financial Advisor Effective as of February 17, 2011 [ECF No. 22520]

Hearing re: 5. Archstone LB Syndication Partner LLC, et al. v. Banc of America Strategic Ventures, Inc. et al. [Adversary Case No. 11-02928] (Hearing on separate transcript)

Hearing re: 6. Motion for Sanctions [ECF No. 22817]

Hearing re: 7. Debtors' Seventy-Third Omnibus Objection to Claims (To Reclassify Proofs of Claim as Equity Interests) [ECF No. 13295]

Hearing re: 8. Debtors' One Hundred Eighteenth Omnibus Objection to Claims (To Reclassify Proofs of Claim as Equity Interests) [ECF No. 15666]

Hearing re: 9. Debtors' One Hundred Thirtieth Omnibus Objection to Claims (To Reclassify Proofs of Claim as an Equity Interest) [ECF No. 16115]

Hearing re: 10. Debtors' One Hundred Thirty-First Omnibus Objection to Claims (To Reclassify Proofs of Claim as an Equity Interest) [ECF No. 16116]

Hearing re: 11. Debtors' One Hundred Thirty-Third Omnibus Objection to Claims (To Reclassify Proofs of Claim as an Equity Interest) [ECF No. 16530]

Hearing re: 12. Debtors' One Hundred Thirty-Fourth Omnibus Objection to Claims (To Reclassify Proofs of Claim as an Equity Interest) [ECF No. 16532]

Hearing re: 13. Debtors' One Hundred Thirty-Fifth Omnibus Objection to Claims (To Reclassify Proofs of Claim as an Equity Interest) [ECF No. 16808]

Hearing re: 14. Debtors' One Hundred Seventy-Sixth Omnibus Objection to Claims (To Reclassify Proofs of Claim as Equity Interests) [ECF No. 19392]

Hearing re: 15. Debtors' Two Hundred Seventh Omnibus Objection to Claims (To Reclassify Proofs of Claim as Equity Interests) [ECF No. 21083]

Hearing re: 16. Debtors' Twenty-Eighth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 9983]

Hearing re: 17. Debtors' Thirty-Fifth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 11260]

Hearing re: 18. Debtors' Fortieth Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 11305]

Hearing re: 19. Debtors' Forty-First Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 11306]

Hearing re: 20. Debtors' Forty-Second Omnibus Objection to Claims (Late-Filed Lehman Programs Securities Claims) [ECF No. 11307]

Hearing re: 21. Debtors' Forty-Third Omnibus Objection to Claims (Late-Filed Lehman Programs Securities Claims) [ECF No. 11308]

Hearing re: 22. Debtors' Sixty-Third Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 11978]

Hearing re: 23. Debtors' Sixty-Seventh Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 12533]

Hearing re: 24. Debtors' Seventy-First Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 13230]

Hearing re: 25. Debtors' Eighty-Fourth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 13955]

Hearing re: 26. Debtors' Eighty-Sixth Omnibus Objection to Claims (No Liability Claims) [ECF No. 14440]

Hearing re: 27. Debtors' Eighty-Seventh Omnibus Objection to Claims (No Liability Claims) [ECF No. 14442]

Hearing re: 28. Debtors' Eighty-Eighth Omnibus Objection to Claims (No Liability Claims) [ECF No. 14450]

Hearing re: 29. Debtors' Eighty-Ninth Omnibus Objection to Claims (No Liability Claims) [ECF No. 14452]

Hearing re: 30. Debtors' Ninetieth Omnibus Objection to Claims (No Liability Claims) [ECF No. 14453]

Hearing re: 31. Debtors' Ninety-Second Omnibus Objection to Claims (No Blocking Number LPS Claims) [ECF No. 14472]

Hearing re: 32. Debtors' Ninety-Fifth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 14490]

Hearing re: 33. Debtors' Ninety-Sixth Omnibus Objection to Claims (Duplicative LPS Claims) [ECF No. 14491]

Hearing re: 34. Debtors' One Hundred Third Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 15003]

Hearing re: 35. Debtors' One Hundred Tenth Omnibus Objection to Claims (Pension Claims) [ECF No. 15010]

Hearing re: 36. Debtors' One Hundred Eleventh Omnibus Objection to Claims (No Liability Claims) [ECF No. 15012]

Hearing re: 37. Debtors' One Hundred Twelfth Omnibus Objection to Claims (Invalid Blocking Number LPS Claims) [ECF No. 15014]

Hearing re: 38. Debtors' One Hundred Seventeenth Omnibus Objection to Claims (No Liability Non-Debtor Employee Claims) [ECF No. 15363]

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Hearing re: 45. Debtors' One Hundred Fortieth Omnibus Objection to Claims (Duplicative of Indenture Trustee Claims) [ECF No. 16853]

Hearing re: 46. Debtors' One Hundred Forty-Third Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 16856]

Hearing re: 47. Debtors' One Hundred Fifty-First Omnibus Objection to Claims (No Liability Claims) [ECF No. 17478]

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Hearing re: 52. Debtors' One Hundred Sixtieth Omnibus Objection to Claims (Settled Derivatives Claims) [ECF No. 18444]

Hearing re: 53. Debtors' One Hundred Sixty-Second Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 18405]

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Hearing re: 55. Debtors' One Hundred Seventy-Fourth Omnibus Objection to Claims (To Reclassify Proofs of Claim as Equity Interests) [ECF No. 19390]

Hearing re: 56. Debtors' One Hundred Seventy-Fifth Omnibus Objection to Claims (No Liability Pension Claims) [ECF No. 19391]

Hearing re: 57. Debtors' One Hundred Seventy-Seventh Omnibus Objection to Claims (No Liability Non-Debtor Employee Claims) [ECF No. 19393]

Hearing re: 58. Debtors' One Hundred Seventy-Eighth Omnibus Objection to Claims (Misclassified Claims) [ECF No. 19377]

Hearing re: 59. Debtors' One Hundred Seventy-Ninth Omnibus Objection to Claims (No Liability Derivatives Claims) [ECF No. 19378]

Hearing re: 60. Debtors' One Hundred Eightieth Omnibus Objection to Claims (Invalid Blocking Number LPS Claims) [ECF No. 19396]

Hearing re: 61. Debtors' One Hundred Eighty-Second Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 19398]

Hearing re: 62. Debtors' One Hundred Eighty-Fifth Omnibus Objection to Claims (Compound Claims) [ECF No. 19714]

Hearing re: 63. Debtors' One Hundred Eighty-Sixth Omnibus Objection to Claims (Misclassified Claims) [ECF No. 19816]

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Hearing re: 65. Debtors' One Hundred Eighty-Eighth Omnibus Objection to Claims (Duplicative LPS Claims) [ECF No. 19871]

Hearing re: 66. Debtors' One Hundred Eighty-Ninth Omnibus Objection to Claims (No Liability Repo Claims) [ECF No. 19870]

Hearing re: 67. Debtors' One Hundred Ninetieth Omnibus Objection to Claims (No Liability Security Claims) [ECF No. 19873]

Hearing re: 68. Debtors' One Hundred Ninety-First Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 19888]

Hearing re: 69. Debtors' One Hundred Ninety-Second Omnibus Objection to Claims (Partially Settled Guarantee Claims) [ECF No. 19875]

Hearing re: 70. Debtors' One Hundred Ninety-Eighth Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 19902]

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Hearing re: 72. Debtors' Two Hundredth Omnibus Objection to Claims (No Liability Claims) [ECF No. 19921]

Hearing re: 73. Debtors' Two Hundred Fifth Omnibus Objection to Claims (Insufficient Documentation Claims) [ECF No. 19936]

Hearing re: 74. Debtors' Two Hundred Ninth Omnibus Objection to Portions of Claim Nos. 29883 and 29879 Filed by Citibank, N.A. and Citigroup Global Markets, Inc. [ECF No. 20030]

Hearing re: 75. Debtors' Two Hundred Nineteenth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 20787]

Hearing re: 76. Debtors' Two Hundred Twenty-First Omnibus Objection to Claims (Duplicative of Indenture Trustee Claims) [ECF No. 20860]

Hearing re: 77. Debtors' Two Hundred Twenty-Fourth Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 20864]

Hearing re: 78. Debtors' Two Hundred Twenty-Eighth Omnibus Objection to Claims (No Liability Derivatives Claims) [ECF No. 20886]

Hearing re: 79. Debtors' Two Hundred Thirty-Second Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 21727]

Hearing re: 80. Debtors' Objection to Proof of Claim No. 66099 Filed by Syncora Guarantee, Inc. [ECF No. 20087]

Hearing re: 81. Debtors' Objection to Proof of Claim Number 29702 [ECF No. 20100]

Hearing re: 82. Cathay United Bank's Response in Opposition to Debtors' Fortieth Omnibus Objection to Claims (Late-Filed Claims) as to Claim No. 35181 and Motion to Have Claim No. 35181 Deemed Timely Filed [ECF No. 12037]

Hearing re: 83. Motion of Pearl Assurance Limited to Deem Proofs of Claim to Be Timely Filed [ECF No. 12072]

Hearing re: 84. Motion of Pictet & Cie and Bank Julius Baer & Co. Ltd. to Enlarge the Time Period for the Filing of Claim Number 64249 By One Day [ECF No. 21979]

Hearing re: 85. Motion of Robert Franz Pursuant to Fed. R. Bankr. P. 9024 Incorporating By Reference Fed. R. Civ. P. 60(b), and Section 105(a) of the Bankruptcy Code for Reconsideration and Reinstatement of Proof of Claim [ECF No. 22665]

Hearing re: 86. Motion of Caisse Des Dépôts Et Consignations to Permit a Late-Filed Claim Against Lehman Brothers Special Financing Inc. [ECF No. 18039]

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P R O C E E D I N G S

THE COURT: Be seated. Good morning.

MR. BERNSTEIN: Good morning, Your Honor. Mark Bernstein from Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings Inc. and its affiliated Chapter 11 debtors. We're here today for what was initially scheduled as a claims hearing, but, as you can tell from the crowd, there's a few other matters on. It turned into a little bit more than just that.

However, the first two items on the agenda are uncontested claims matters which I'll be handling and then turn the podium over to some of my colleagues. The first item on the agenda is the debtors' objection to reduce and allow the claim of Wilmington Trust Company, which was initially heard at the November 30th claims hearing. The order was granted with respect to the nonstructured securities claims, and Your Honor had asked for additional information and a declaration be filed related to the structured securities claims and the notice that had been provided to the holders regarding the injunction that Wilmington had requested be included in the order.

Wilmington did file a declaration including that notice, which specifically notified the holders of that requested protection. Wilmington's counsel is here today if Your Honor has any further questions on that matter. If not we respectfully request that be granted on an uncontested basis.

THE COURT: It will be granted on an uncontested basis. I've reviewed the declaration of Julie Becker and it satisfies all of my questions from November 30.

MR. BERNSTEIN: Thank you, Your Honor. The second item on the agenda is a carryover item from a prior hearing as well. This is to the debtors' one hundred thirty-sixth omnibus objection, which seeks to reclassify certain claims that were filed as secured as unsecured. These claims generally were filed as secured in order for the parties to reserve their rights of setoff that they might have in the future. We're going forward today with respect to two claims, one the claim of Xanadu Holdings, for which we had extended the objection deadline. That party has not filed their response. Their deadline has expired. And the claim of Olivant Investments Switzerland, who did file a response to the objection. However, their response merely reserves their right to assert that any property is not property of the estate. They're not objecting to the reclassification of their claim as unsecured, and, as a result, we're seeking to go forward on an uncontested basis and have those two claims reclassified as unsecured and respectfully request Your Honor grant that.

THE COURT: I think counsel wishes to comment.

MR. SHAMAH: Your Honor, Daniel Shamah on behalf of Olivant Investments Switzerland SA. I just wanted to note my appearance. We did file a reservation of rights. It's not on

the agenda, but counsel's description of that reservation is accurate and we do not have any opposition to the relief requested.

THE COURT: Fine. That is granted on an uncontested basis.

MR. BERNSTEIN: Thank you, Your Honor. At this point I will cede the podium to Mr. Krasnow to handle the next item.

MR. KRASNOW: Good morning, Your Honor. Richard Krasnow, Weil, Gotshal & Manges, on behalf of the debtors. Your Honor, the next item on the agenda is item number 3, which is the debtors' motion for authorization to implement the Defense Costs Fund that appears on docket number 22647. Your Honor, pursuant to this motion the debtors seek authority to use up to, but no more than, two million dollars to provide funding to current directors and one current employee of LAMCO with respect to defense costs that they might incur in connection with pending actions that relate to pre-petition acts as to which, while the debtors are not named in those proceedings, claims have been asserted against the debtors in proofs of claim, either by the plaintiffs or by the defendants in indemnity claims in amounts which -- asserted amounts which are in the hundreds of millions of dollars.

Your Honor, the debtors have set forth, both in the motion and in a reply to an objection, the only objection that was filed to the motion, an objection filed by the creditors'

committee as to the business reasons why they believe the establishment of this fund, and it's not a fund, per se, we're just making two million dollars available, is warranted. In respect of that objection, Your Honor, subsequent to the filing of the objection we engaged in discussions with the creditors' committee and facilitated a resolution of the committee's objections, facilitated based on discussions we had with the respective counsel for the current directors and the current employee of LAMCO. That resolution, Your Honor, is set forth in a revised order that we filed with the Court yesterday in both clean and blackline formats, and, if I may, Your Honor, just set forth what that resolution is.

It's really twofold, Your Honor. The order makes it clear, or proposed order makes it clear that this two million dollar fund, if you will, will not be replenished, so once exhausted there will be no further funding from the debtors. Secondly, the individuals who would benefit from the establishment of this fund have agreed that to the extent that any of their indemnification claims are allowed their distribution entitlements in respect of those claims would be reduced on a dollar for dollar basis based upon that portion of the two million dollars, if any, which is actually advanced to them or their counsel. It's our understanding that based upon those resolutions the committee is prepared to withdraw its objection, and assuming that counsel confirms that we would

respectfully request that for the reasons set forth in the motion and in our reply that the relief be granted.

Your Honor, unless the Court has any questions perhaps it would make sense to simply turn the podium over to committee counsel.

THE COURT: That's fine. I'll hear from the committee.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy, on behalf of the official committee. Your Honor, Mr. Krasnow's recital of where we are is correct. We did file an objection to the relief requested in the motion, because we do have a long history with this issue in terms of insurance coverage, tail coverage in two instances where the directors and then the approval of the legal defense cost motion back in June. We thought the circumstances were different there. We thought the debtors' business judgment was different there. Here we continued to believe that there was no legal right as originally presented to this type of entitlement for the directors and question the debtors' business judgment.

The discussions that Mr. Krasnow alluded to resulted in modifications to the relief being granted, which we think largely address our concerns in terms of the dollar for dollar reduction of any claims that the directors may have on indemnification claims, which would bring the distributions to

them closer to those that are being made to all other unsecured creditors and the commitment that there will be no replenishment of this fund.

So with those changes we are prepared to withdraw our objection.

THE COURT: And you are, in fact, withdrawing the objection.

MR. O'DONNELL: We are, in fact, withdrawing our objection, yes.

THE COURT: Great. This is approved now as an uncontested matter. I've reviewed the modified order, which reflects the adjustments just described, and I am pleased that this has been resolved, because this really represented one of the very few times in my recollection that the creditors' committee and the debtor were at odds.

MR. KRASNOW: Yes, Your Honor. We appreciate the fact that the committee worked with us in resolving this in the manner described.

THE COURT: Okay. Fine. It's approved.

MR. KRASNOW: Your Honor, if we may jump on the agenda, because it's my understanding that there is something listed, item number 6 is a contested matter, which is now an uncontested matter, and if I may turn over the podium to my partner, Mr. Levine.

THE COURT: Okay.

MR. LEVINE: Good morning, Your Honor. Richard Levine from Weil, Gotshal for debtors LBFP. This was a motion for sanctions against an ADR counterparty which was not disclosed in the public record.

THE COURT: Right.

MR. LEVINE: Their counsel is here, and I am pleased to say that based on discussions that --

THE COURT: Will he be wearing a bag over his head?

MR. LEVINE: No, it's the mask. And, obviously, it was disclosed to the Court and the committee and the U.S. Trustee and so forth. I'm pleased to say that based on discussions that began yesterday afternoon and were resolved with the signing of a stipulation in this courtroom this morning there is an agreement in it by stipulation where the counterparty will be serving an ADR response which responds to these three specific issues raised in the ADR notice, the enforceability of the flip clause in light of the prohibition on ipso facto clauses, the amounts that the debtors claim are due on termination from the two issuers involved, and whether that payment must be made. The counterparty has agreed that it has full authority to negotiate a settlement on its behalf, and the parties have agreed, notwithstanding the fact that the counterparties, as it has participated previously in good faith, and the debtors have argued that they did not, that the counterparty will participate in the ADR process and mediation

in good faith going forward. And the stip also specifically recognizes that any settlement may include a mechanism which can protect the issuer from claims of noteholders subject, obviously, to notice the noteholders and approval of the Court.

So the debtors and the committee, I think, are happy with this resolution. We expect the ADR to go forward smoothly and hopefully will result in a settlement, or, if not, we will litigate, but we thought it was important that the issues that were raised were resolved either by a Court ruling or by a resolution such as this.

THE COURT: I think I should hear from counsel for the undisclosed counterparty confirming that the arrangements just described are, in fact, acceptable.

MR. YOSKOWITZ: Thank you, Your Honor. It's Jackie Yoskowitz from Seward & Kissel for the counterparty. Mr. Levine's description is correct. When I saw Mr. Levine's reply to our objection to his motion for sanctions I realized parties were, sort of, saying the same things. Our issue had always been we thought we could negotiate for ourselves, but with respect to the noteholders we had concerns about overpromising at a mediation. With my discussions with Mr. Levine yesterday and the stipulation that we worked out I think we're of the same mind and we understand that there's a mechanism that we can agree on, hopefully, in the future to get everybody on board with a potential settlement. So we're comfortable with

the stipulation.

THE COURT: Good.

MR. YOSKOWITZ: Thank you, Your Honor.

THE COURT: Let's proceed with a successful ADR then.

MR. YOSKOWITZ: Hopefully we will. Thank you, Your Honor.

THE COURT: Okay.

MR. LEVINE: Thank you, Your Honor.

THE COURT: Okay. So that stipulation will be submitted in writing for approval.

MR. LEVINE: Your Honor, we had not prepared it for Court approval. It was just between the parties, but if the Court wants a copy I'm happy to hand it up.

THE COURT: There's no need for that. It wasn't clear to me procedurally what you had in mind. If all that's happening is that the motion for sanctions is being withdrawn without prejudice on the assumption that the parties perform in accordance with their separate stipulation that's fine.

MR. LEVINE: That is, in fact, what was going on. We are going to file the redacted stipulation on the record so that --

THE COURT: But you're not looking for Court approval.

MR. LEVINE: But we're not looking for Court approval.

THE COURT: Fine.

MR. LEVINE: Thank you, Your Honor.

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil, Gotshal & Manges, on behalf of Lehman Brothers Holdings Inc. and its affiliated debtors. Flipping back, Your Honor, to number 4 on the agenda, this is the first contested matter. It's the application of the debtors for authorization to employ and retain Gleacher & Company Securities, Inc. as financial advisor, effective as of February 17, 2011.

As reflected on the docket, Your Honor, objections to the application have been filed by the Office of the U.S. Trustee and the creditors' committee. The debtors filed an omnibus reply in response to the objections as well as the supplemental affidavit of Stephen Hentschel of Gleacher. Our understanding is that the supplemental affidavit resolves the U.S. Trustee's objection with respect to the disclosure matters.

In addition, Your Honor, as described in the debtors' reply, there have been some adjustments made to the engagement agreement which resolved the objections of the U.S. Trustee and the creditors' committee to the nunc pro tunc nature of the engagement. Specifically, the monthly retainer has been eliminated, and the schedule that sets forth the applicable transaction fee has been revised to increase the transaction fee payable in certain circumstances, subject to the same fifteen million dollar cap. We filed a revised proposed order last night to reflect those changes, and the revised order has

been reviewed by the U.S. Trustee and counsel to the creditors' committee. As a result, although the engagement will still be nunc pro tunc to February 17, 2011, the effect of that is limited to the indemnification provided to Gleacher and to Gleacher's right to reimbursement of expenses.

I believe that the U.S. Trustee is prepared to forego any further objections at this point, based upon the language in the proposed order regarding the U.S. Trustee's ability to object to the fees payable to Gleacher based on the reasonableness standard set forth in Section 330 of the Bankruptcy Code.

We're left, therefore, Your Honor, with the objection of the creditors' committee. The creditors' committee's remaining concerns relate to the possibility of duplication of services and duplication of transaction fees. As indicated in the debtors' reply and as can be confirmed by Bryan Marsal, who is here in court today, there's no risk regarding duplication of services, because Lazard has not rendered any services to the debtors regarding Archstone. Moreover, as set forth, again, in the application and the reply, the debtors believe that Gleacher is uniquely qualified to advise them regarding Archstone matters, and, therefore, have not requested Lazard to render services relating to Archstone.

The debtors want their financial advisor for Archstone matters to be a firm that's familiar with the property,

familiar with the management and familiar with the multifamily unit community, and Gleacher satisfies all of those prerequisites.

The creditors' committee, which has been actively involved in the debtors' deliberations with regard to Archstone, knows that Lazard hasn't been involved in any of the Archstone discussion and also knows the extent to which Gleacher has been involved in advising the debtors with respect to Archstone.

As far as the risk of duplicate transaction fees is concerned, while the committee is correct that the debtors and Lazard have not agreed to exclude Archstone from the services rendered by Lazard, given that in accordance with the order dated March 22, 2011 granting the debtors' supplemental application with respect to Lazard the Court can review Lazard's compensation under the standards set forth in Section 330 of the Code the debtors believe that there is little risk that Lazard will be able to demonstrate that it is entitled to a transaction fee with respect to Archstone.

In any event, in light of the extensive services rendered by Gleacher to date and the importance of resolving Gleacher's engagement at this time, in light of all the recent activity pertaining to Archstone, the debtors do not believe it is appropriate to make Gleacher take the risk with respect to approval of its fees. Rather, Lazard's entitlement to the fee

will be taken up by the Court at a later date if Lazard files an application seeking compensation regarding Archstone.

For all of the foregoing reasons, Your Honor, the debtors believe that the engagement of Gleacher on the terms outlined in the application as revised is necessary, appropriate and reasonable, and we request that the Court approve the application.

THE COURT: I have a couple of questions, and I am pleased to see that progress has been made in resolving the objections to this application. But first is really one that's based on pure curiosity on my part. Given the sophistication of the parties, how is it possible for Gleacher to have been involved on a consulting basis since February 17 of 2011 and for no application to have been made for approval of that retention? That just shocks me.

MS. MARCUS: It's very complicated, Your Honor, but we have -- and that's an understatement.

THE COURT: Things in this case usually are complicated.

MS. MARCUS: That's an understatement. There have been many iterations of the Gleacher engagement. At certain points in time it was expected that Gleacher would be engaged by the Archstone entity, as opposed to by the debtors. There were a lot of different alternatives considered, and there have been discussions with Lazard for some period of time in an

effort to resolve this. To be perfectly frank, the application was drafted many months ago, and we've just been trying to work through it.

THE COURT: You anticipate my second question, which is whether or not Lazard will agree to carve out from any claim it might otherwise make in this case those services that are being performed by Gleacher, thereby eliminating any risk that we have to be involved at some future date in an argument over a claim by Lazard for a right to a transaction fee.

MS. MARCUS: To date they have not been prepared to do that.

THE COURT: Is Lazard represented in court today?

MS. MARCUS: They said they might have somebody here, but apparently not.

THE COURT: That was a wise move on their part, I think, because I would have called whoever that was up to make public inquiry.

All right. Those are my questions. I'll hear from those who have objected to see whether or not the order as modified satisfies those objection.

MS. GOLDEN: Your Honor, I'll be brief. Susan Golden for the U.S. Trustee. Ms. Marcus accurately described the nature of the resolution of the U.S. Trustee's issues. Certainly the Lazard fee is of great concern to the U.S. Trustee, but the U.S. Trustee does have 330 rights from

Lazard's initial engagement, and with that the U.S. Trustee was satisfied that, if need be, the U.S. Trustee would deal with the Lazard claim for the 17 million dollar transaction fee at the time that Lazard put it an application for it.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy, again, on behalf of the committee. Your Honor, we are pleased, as well, that there's been some progress towards resolving this. We've certainly been trying for a long time to resolve the issues relating to this application. As Ms. Marcus indicated, there has been a long discussion of whether Gleacher should be retained here and how we should deal with Lazard as a result that probably go back to February of this year, so the nunc pro tunc, I think, is easily explainable by that dialogue back and forth.

However, we would not be here -- as you observed earlier we -- the committee has rarely objected to the debtors' applications at this stage, when they've actually been before the Court. We've obviously acted behind the scenes in many instances, but here we just got to a point where we knew we could not see eye to eye on the issue, and the single issue, really, that is the one that's been of most interest to us and why we're here today is the possibility of a duplicate fee with respect to Lazard.

I don't think we debate that Lazard has not been involved. We haven't seen Lazard involved in this situation.

We know Gleacher has been. However, Lazard does have an engagement letter that provides that it gets a fee for this type of transaction. That letter also provides that that fee can be waived or they can carve it out. That has not happened. And it says that Lazard cannot unreasonably withhold its consent, and, notwithstanding that, nothing has happened.

There has been a lot of back and forth on the issue, but we're still here today with an application where the debtors are seeking to retain and, ultimately, pay Gleacher for something that Lazard has said, has argued it would be entitled to a fee for as well. And we believe under those circumstances it would be difficult for the Court to grant 328(a) approval here.

In terms of the Court needing to make a determination that the fee structure is reasonable, if there is a clear and foreseeable possibility that another professional will assert a claim to this -- assert fees with respect to the same transaction and possibly the debtors would wind up paying twice for the same fees. Under those circumstances making the 328 reasonableness determination is difficult.

It also would raise an issue for us in terms of challenging it down the road, because if the Court approves this application pursuant to 328(a) it could only be undone if it was shown to be improvident based on events that could not have been foreseen at the time. Clearly we, everyone in the

courtroom can foresee at this point that Lazard may, maybe not, but may assert a competing claim here to a fee for the same transaction, and under those circumstances we would not be able to meet the 328(a) standard and could arguably not object to any reduction of the Gleacher fee at that time to take into account a Lazard fee.

So our primary issue, remaining issue, is with the need for -- the possibility of a 328(a) approval today. In terms of whether there has to be an approval today at all, I'm not sure why there has to be. There's been eleven months of the back and forth. I think our suggestion is that we go back to the table again and try to get Lazard at the table and try to get this issue resolved and then approve it. With the monthly fees off the table Gleacher isn't go to see any compensation here until they consummate a transaction, so there's no pressing need, from our perspective, to actually approve this today. With this issue on the table we need to have Lazard at the table and we need to try to figure out whether we can definitively resolve this issue to avoid a fight down the road.

THE COURT: So that last point surprised me, because my expectation was that I was hearing from the two objectors saying as a result of the revised order we're prepared to accept the engagement. What I'm hearing you say is that you would prefer that this be deferred to another omnibus hearing

date, perhaps January 11, and that between now and then some effort be made to clarify Lazard's position. Is that what you're saying?

MR. O'DONNELL: I think if that's said that's, perhaps, a fallback more than -- and I think our initial position here is that to the extent that the Court is going to approve it today it needs to approve it with some clear reservation of rights or clear contingency as to the existence of a Lazard fee. It can't be a clear-cut 328(a) approval. That would preclude us from challenging Gleacher's fee down the road to reduce it to take into account a Lazard fee.

Should the Court not want to go there the other option here, since we all know that the issue is trying to get Lazard to the table, that we adjourn it and try once again to get Lazard to the table and get it done.

THE COURT: Well, I don't think there's going to be a problem getting Lazard to the table, because I am going to direct that to occur, and we're going to have a chambers conference on this sometime before I enter an order. It may not be required that we have a further hearing on it, but I do want to hear from authorized representatives of Lazard as to what their actual position is with respect to any claims to be made with regard to Archstone.

I would expect them to exclude Archstone from any claim they might otherwise make. If they refuse to do that we

have a problem, and we might as well find out that we have that problem now.

I'm available for a conference tomorrow or Friday. Or anytime next week. I am actually here throughout the holidays and do not want this to in any way drag. If it needs to because of holiday plans of parties who need to be at the meeting I am proposing this may end up being put off until January 11, but I view that as a less favorable alternative.

So what I am prepared to do is to approve the arrangement subject to there being an acceptable understanding, properly documented, with Lazard concerning Lazard's ongoing claims, if any, with respect to the Archstone transaction, and I am prepared to have a meeting on that tomorrow or Friday.

MS. MARCUS: Your Honor, can I take one more shot? I, obviously, will do what you've suggested, but in the alternative, I understand your concern about Lazard's position. I guess I would say from Gleacher's perspective they want to get this resolved as soon as possible, and we think that's appropriate. In fact, they were served, I believe, with --

THE COURT: Tomorrow is not soon enough?

MS. MARCUS: If it can be arranged I'm certainly available. Everybody from Lehman's side will be available for a conference. My only point was going to be since any compensation requested by Lazard is ultimately up to Your Honor anyway could we get the Gleacher engagement approved now

without the reservation that Mr. O'Donnell requested, and then you'll make sure that there is not a duplication of fees at the appropriate time.

THE COURT: I can always make sure that there is not a duplication, but I have had personal experience with 328(a) and with the Second Circuit's decision in Smart World, and I want this resolved prior to any formal engagement. I want to see Lazard tomorrow in my chambers, and if that can't be done we'll find another day when it can be done. The approval of this engagement, and I mean no disrespect to the work that has been done by Gleacher and that will be done by Gleacher, but we can't have clashing titans each claiming that they're entitled to significant fees from this estate and have me be the arbiter only to have an argument that I actually don't have the authority, based upon the form of the order, to tell certain people that they need to go away.

MS. MARCUS: Okay.

THE COURT: So I'm not going to create the problem. I'm going to avoid it.

MS. MARCUS: That's fine, Your Honor. We'll contact your chambers to schedule a time.

THE COURT: And hopefully that can happen tomorrow.

MS. MARCUS: Okay.

(Adversary proceeding heard from 10:33 a.m. to 1:49 p.m.)

THE COURT: Be seated, please.

MR. BERNSTEIN: Good morning, again, Your Honor. It's Mark Bernstein of Weil, Gotshal & Manges on behalf of the Lehman Chapter 11 debtors. The remaining nine items on the agenda are all omnibus objections that were filed by the debtors to claims asserted by former Lehman employees based on restricted stock units or RSUs. Since the objections are all identical, I think it makes sense if Your Honor agrees to take them all at one time.

THE COURT: I agree.

MR. BERNSTEIN: Okay. The objections seek to reclassify each of the claims as equity interests in LBHI. Prior to the commencement of these Chapter 11 cases, LBHI granted RSUs to employees as part of their compensation, in order to enable the employees to participate in any increase in value of the Lehman enterprise.

The RSUs bear the hallmarks of traditional equity interests. The holder benefit from the increased value of the corporation, receive dividends and bear the risk if the corporation should fail. The RSUs has rights to acquire common stock in LBHI, which is all they entitle their holders to receive, followed in the definition of equity security in Section 101-16 of the Bankruptcy Code.

A particular telling fact about the nature of the RSUs, Your Honor, is had LBHI delivered to all the holders of the RSUs on the day before bankruptcy the common stock that

they were entitled to receive in exchange for their RSUs, we wouldn't be here today, because all the holders would merely be common stock holders, and which would very clearly be equity interests in the debtors.

The terms of the programs under which the RSUs were issued also evidence that the claims should be reclassified as equity interests. Under the program documents under which the RSUs were issued, at no time did any of the claimants have any right to demand or receive cash in exchange for their RSUs. The program documents all included language to the effect that "Holdings and any of its subsidiaries' obligations with respect to the" -- this one I'm readying from is 2007 -- "the 2007 units granted hereunder, is limited solely to the delivery to you of shares of common stock on the date on which such shares are due to be delivered hereunder. In no way shall Holdings or any subsidiary become obligated to pay cash in respect of such obligations."

One of the main contentions that the creditors make in response to these objections is that the RSUs were issued as part of their compensation. The debtors don't dispute that. As part of either their bonus or if they were commission-based employees, part of their compensation was, in fact, issued in RSUs. However, compensation and equity interests are not mutually exclusive. The fact that the equity was issued as part of compensation has no bearing on the classification of

these claims or the priority in which they're entitled to recover from LBHI.

Two of the program documents, the 2003 and 2004, expressly provided that the claims are to be treated as equivalent with common stock of LBHI. And pursuant to Section 510(a) of the Bankruptcy Code, those subordination provisions in the documents should be held enforceable in these cases.

Alternatively, Your Honor, should the RSUs be considered claims against the debtors and not equity interests in the debtors, they must be subordinated as equity interests under Section 510(b) of the Bankruptcy Code, as these claims all arise from the purchase of securities.

Section 510(b) has been interpreted very broadly by the courts in this circuit and applied in similar contexts as the facts in this case. The bankruptcy courts in the Enron and WorldCom case and the Section Circuit in In re Med Diversified, among other courts, have embraced the broad interpretation of "arising from" in the statute and have subordinated claims if there's any nexus or causal relationship between the purchase of the securities and the damages that are being claimed.

In this case, the claimants purchased the RSUs with their labor. It's not -- they didn't actually buy the shares, they didn't exchange cash, but by working for Lehman, they exchanged their labor for these RSUs. Bankruptcy courts in Enron, WorldCom and U.S. Wireless, have all held that employees

who receive RSUs as part of their compensation or similar instruments, purchased those securities with their labor, for the purchase of 510(b) -- the purchase requirements. This is settled law in this jurisdiction.

Despite their contentions that they had no choice and did not elect to receive the RSUs, by accepting employment for Lehman and going to work every day, they continuously accepted that condition to their employment, which was, part of your compensation will be paid in RSUs.

Creditors have asserted a variety of theories and liability against LBHI relating to the RSUs, ranging from the diminution in value of the RSUs, fraudulent statements that were made by LBHI in their financial statements prior to or in connection with the issuance of the RSUs, that led them to hold onto their common stock or these RSUs or induce them not to sell.

Other creditors have asserted that the debtors breached their employment agreements by actually issuing these RSUs as opposed to paying them in cash, although no creditor has produced an employment agreement that said your compensation will be paid in cash. And several of the employment agreements that were attached to the responses or the claims specifically provide that Lehman was entitled to pay part of the compensation in equity awards.

Courts have held that claims based on all these types

of theories of damages have been -- can be subordinated, pursuant to 510(b) of the Bankruptcy Code.

Certain employees who were commission-based employees have attempted to distinguish the RSUs that they would have received for the year of 2008 from the other RSUs that were actually issued. When the employees who were commission-based -- each month they received a statement based on their performance about how much equity they had accrued for that month. But those employees actually did not receive the RSUs until -- typically until the end of the year, November or December, I think is typically how it worked.

So these employees have argued that they did not receive their RSUs, and therefore those portions of their claims that were based on their 2008 compensation, should for some reason, be treated differently from the portions of their claim for which they actually do have RSUs. Because their argument is they haven't received anything in exchange for their labor.

However, there's nothing that says they're entitled to cash in any document that they've provided. And in fact, the way the debtors are proposing to treat those claims is that we will subordinate the entire amount of their claim as equity, not just the portion for which they have issued RSUs. So had they been issued RSUs on a monthly basis, they would have just had RSUs in the amount of that withheld compensation or that

portion of their compensation which was equity accrual, and they would be treated the exact same way as the debtors are intending to treat them under these objections, which is that portion -- they would have those RSUs, and those should be subordinated.

LBHI has put forth facts and law that dispute the claims asserted by these claimants. And as a result, the burden has shifted back to these claimants to prove by a preponderance of evidence that their claims are valid, based on the law in this jurisdiction.

Your Honor, in sum, these employees received exactly what they bargained for when they signed up to work at Lehman. They received the right to acquire common stock in LBHI as part of their compensation. As part of that, the employees also bargained for the risk that Lehman might potentially fail, and then that common stock would not have any value.

These equity awards are just that. They were equity. And claimants who hold them should not now be able to bootstrap themselves up to general unsecured creditors by asserting different theories of liability.

The creditors' committee has filed a statement in support of the subordination pursuant to 510(b), and the debtors respectfully request that each of the claims be classified as subordinated -- as equity interests in LBHI. And I'm happy to answer any questions Your Honor may have, or it

may be proper to hear from some of the respondents, first.

THE COURT: Well, let me share with you the challenge that I had in trying to deal with these various objections to claim disallowance.

The debtor filed an omnibus reply. The omnibus reply deals with all the legal arguments and also includes, as an attachment, a schedule that references the objections of various claimants without identifying them by name. One of the problems that we had in chambers in attempting to understand the position being advanced was to correlate the position of the debtors with respect to the particulars of each claimant. And that was time consuming and frankly, somewhat burdensome.

One of the questions that we still have, however, and I'd like to just understand how we're approaching this, is whether we are dealing today on a claim-by-claim basis, or whether or not we are dealing with all of the claims as if they are part of a class.

Judge Gonzalez, in his Enron decision, dealt with somewhat comparable claims that arose in Enron, but that were predicated largely on claims of fraud, but dealt with those claims as one class without going to the specifics of each claimant's assertions.

I don't know, as I sit here, how you intend to approach today's hearing. And there are different arguments that have been made by different former employees arising under

different annual programs. And I don't know whether or not you intend to approach this as a class-wide issue, which effectively is the creditors' committee's approach, saying you don't have to worry about the specifics; regardless of the particulars, under 510(b) all claims should be treated as equity.

So my first question to you is, how am I supposed to get through this thicket? We have a fairly packed courtroom still and we have people on the telephone. Are we doing this on a claimant-by-claimant basis? Are we doing this on a class basis? Whichever way we do it, I want it to be fair and I want everybody to have an opportunity to be heard. And in part because of the added omnibus-type matters that we heard this morning that wouldn't ordinarily be heard at the time of a claims hearing, it's now almost lunch time.

MR. BERNSTEIN: Sure. Let me respond to that. We believe that the legal issues that relate to each of these claims are identical. Now, certain creditors, as you stated, raised different type arguments. But the programs under which these RSUs were issued, they may have slight differences from year to year, but in substance, and the relevant provisions of those program documents, for the purposes of the arguments that we make here today, the programs are identical.

And we scheduled all of these omnibus objections which were filed at different times throughout the year, all for one

hearing, in the interest of fairness. Because some of these parties are pro se, some of them do have counsel. The claims vary in amount. But we thought it made sense to have all of the issues and all the arguments on the table and to deal with them as a class. Either the claims -- the claims are, from our view, the same claims. Reserving the right to -- if certain parties have facts that they assert that are different than others, we can talk about those separately. But generally, we believe the claims and the nature of these claims are the same, and the legal issues are the same, and are prepared to deal with it as a class, unless there do arise, one-off issues, which we can talk about, I guess, as those arise.

THE COURT: Well, I guess the first thing I'd like to find out is if there is any affected claimant that objects to treating it as a class-wide matter and wishes to be heard separately -- apparently hands are going up everywhere. So this is going to be not -- according to their wishes, it's not going to be on a class-wide basis. At some point it may become that.

There are basically two ways that this can be approached -- maybe more than two, but two that occur to me. One is for every argument made by every claimant to apply to every claimant in the same class, notwithstanding the fact that we are, by a show of hands, preferring to do this on an individual claimant basis. I had thought, as I was preparing

for this morning's hearing, that the debtors' response was effectively putting all claims in the same basket, and by doing so, was treating every argument as if it applied to every claimant, and then attempting to defeat each one of those arguments.

In some respects, it is fairer to the claimants individually for them to have the benefit of, in effect, every other argument that every other similarly situated claimant has made, whether or not they made that argument, thereby allowing for the possibility that if one argument is a successful argument that applies across the board, that everybody gets the benefit of it, but that if there's an argument that's particular to a particular program or to a particular claimant, obviously that would be personal.

I have some concerns just from a case management perspective as to how we deal with all these individuals on this one day. And it wasn't certainly my choice that employee claims would all be heard at one time in this manner, it was the debtors' choice. So I'm going to take suggestions as to the most efficient way to deal with this in a manner that also protects the interests of each individual.

MR. BERNSTEIN: Sure. I mean, I think that we will see when the various claimants do get up to state their arguments, that the issues involved are the same. They may want to have -- phrase them differently or characterize them

differently. But these claims all arise from identical instruments. And the facts surrounding their issuance was identical. They got them as part of their compensation.

So I'm not exactly sure what the different creditors are going to say that would result in there being different rulings or there could be different decisions made on a claim-by-claim basis. And we had thought, as Your Honor, that it was the most fair to allow all of the argu -- any argument made by any claimants to be used for the benefit or by the benefit of any other claimant. Because these issues really, as we viewed them, these claims are the same.

Whether someone raised an argument in their response or not, they have the same rights as any other holder of these RSUs. And we think they really should be treated the same way, whatever way that ultimately is. So I think that maybe if we start to hear from the claimants, we will -- it's our belief that we will see that the issues really are the same. I could be wrong. But that's where I think this ends up.

THE COURT: Does the creditors' committee have anything to say?

MR. O'DONNELL: Your Honor, on that last point I think we agree as well, that that would be the most efficient way to proceed. We think the arguments are -- overlap significantly. And if we grant the benefit of each argument to each of the claimants, I think that's a fair way to proceed.

Beyond that, I'm just noting that our objection took the position that the 510(b) arguments are the cleanest and most efficient way to decide this. We wish the circumstances were different. We realize that these -- you know, the former employees were valuable assets of the Lehman enterprise, pre-petition. But the bottom line is that they had two types of claims. They had claims for cash and claims for equity compensation. And equity compensation brings 510(b) into play. And we don't see how any other result other than that advocated by the debtors and the committee is possible here.

THE COURT: Okay. I'm going to make a general comment and then I'm going to just take the claimants in turn, and we'll see whether or not these positions begin to clump together. If they do, fine. If they don't, we'll deal with it.

In anticipation of today's hearing, I reviewed the papers submitted, including the papers submitted by the debtors in omnibus reply. And it became clear to me that one case in particular was particularly relevant, and that was the case I just referred to earlier, Judge Gonzalez's decision in the Enron matter.

It's a very long decision and one that does not, in all respects, apply here. But it's that decision that, in effect, led to counsel's quotation of the exchange of labor for the consideration of RSUs, because Judge Gonzalez used that

terminology in his decision in 2006, I believe or 2003. I'm not sure of the exact year. But I did -- if somebody has the year we can correct the record.

UNIDENTIFIED SPEAKER: 2006.

MR. BERNSTEIN: 2006.

THE COURT: 2006? I was right the first time.

The decision treated all of the employee claims with sympathy as part of the same class of claimants and focused on Section 510(b) of the Bankruptcy Code, its legislative history, the role of a Law Review article that was published in 1972 in the New York University Law Review, in which Homer Kripke was one of the authors -- I only remember that because he was a professor of law that I had when I was in law school -- and that shows you how old I am.

The rather thoughtful decision pointed out that there's a fundamental policy that is at stake in Section 510(b), and it's as fundamental as where stakeholders should rank in the distribution of assets out of a Chapter 11 estate. And without recharacterizing what the Court said in Enron, in effect, Judge Gonzalez concluded that regardless of how these rights to receive stock may be characterized, that they are really governed by Section 510(b), which leads to subordination of the contract right to receive stock to the same level as an equity holder.

And I want everybody who's about to speak to know that

unless you can demonstrate that the instrument governing your right is distinguishable from what was at issue in Enron -- and there's a footnote to the opinion, I think it's footnote 3, where Judge Gonzalez notes it's possible that there may be some way to structure a right to receive restricted stock in a manner that would take it outside the ambit of the 510(b) subordination -- and now I'm paraphrasing -- but I doubt it.

In effect, what the footnote says is I'm not ruling for all time, for all purposes, in every example that may come before a bankruptcy court that these stock options are necessarily to be subordinated, but I kind of doubt that it's going to be possible to do that.

So I say this so that those who are speaking recognize that what I'm really looking for, if you can tell me, is what it is about your claim that takes it outside of the reasoning that I've reviewed and that I intend to follow. And those who are represented by counsel may want to have the lawyers speak first, only because this is a fundamentally legal issue, and it may be that you'll be helped by what they have to say. And if the lawyers don't get up, that's a bad sign.

I'll take anybody who wants to come forward. Now, we have a whole bunch coming forward. Feel free to come forward and sit in front of the bar of the court, and you can get up in turn and make your arguments.

MR. ABRAMOWITZ: Thank you. May it please the Court,

Steven Abramowitz. I represent Lisa Marcus. Lisa Marcus is a commission salesperson. I do want to distinguish, our claim is very distinguishable from what has been described which is respect of RSUs that have been granted regarding RSU instruments. What this claim relates to is the following methodology that Lehman employed.

Lehman had both commission salespeople and bonus employees. With respect to bonus employees, they received their money at the end of the year, and it was a simple matter that when Lehman typically issued RSUs at the conclusion of the year, which for this year would have been 2008 -- November 30, 2008, they would have simply deducted that from the bonus, and that would have paid for the RSUs. At the time the RSUs would have been issued, the value of that RSU would have been determined, the number of shares, what the strike price would have been, et cetera.

For commission salespeople, like my client, because the draw and their commissions goes up and down in the year, they simply withhold that money from their compensation during the year. And in the claim we attached a compensation statement produced by Lehman that showed what that deduction was.

Lehman, in July 2008, because of all the turmoil that was facing the company, they did decide to issue some of the anticipated November '08 RSUs early. And some -- so people did

get the benefit of RSUs. And then my client would have had the benefit of the increase and decrease for that small portion. That portion is not included in the claim that I'm debating. And this claim does not involve any RSUs that were issued.

What happened is, compensation was deducted every month from Lisa's commission and draw, and then the bankruptcy intervened. Because the bankruptcy intervened, a couple of things happened. Number one, the RSUs were never issued, because a critical event had to have happened. Lehman's board would have had to have met. They would have had to approve the RSUs. They would have had to, importantly, determine what the number each employee would get, and that would have been based on the price.

At that point, had the RSUs been issued, Lisa would have been a beneficiary and had the detriment of the increase or decrease in the stock. But Lehman went into bankruptcy before that could happen. So I contend that this is simply a case of compensation that was not paid, that is due under the labor law. It's a right to payment.

If anything, the most that Lehman had is, had Lehman not gone into bankruptcy, they would have had the right to have issued RSUs in exchange for that money. But that right, at most, would have been right that under 365 is not enforceable. This is simply, again -- we're not talking about RSUs that were issued. We're not talking about the provisions of the various

instruments that say once RSUs are issued they vest under the following circumstances; they're forfeited under the following circumstances; you're not entitled to stock instead of your RSUs. This strictly relates to deductions from pay for a commissions salesperson that were not received because of the intervening bankruptcy. And it's not in respect to any RSUs that were issued.

So for this amount, there was none of the characteristics that Judge Gonzalez in Enron and that the court, particularly in Med Diversified, where they talk about someone who bears the risk and rewards of shareholding, should bear that risk and be subordinated. Lisa never got that opportunity, because the stock was never issued. So she had effect as being treated differently than non-commission salespeople who, you know, they never got that -- they never got the bonus; the bonus was never used for the issuance of RSUs. This was simply pay that was deducted as security by Lehman for the possible issuance, which issuance never occurred.

THE COURT: Let me ask you how this program worked in one detail that occurs to me that could be of relevance. Did Lisa or others like her have the option to not buy stock? In other words, could they right to payment be a right for payment in cash, or was it simply money set aside that could only be used to acquire the RSUs?

MR. ABRAMOWITZ: I believe that had the board actually acted to issue the RSUs, they could have only been used for RSUs.

THE COURT: So if the money could only be used for RSUs and the RSUs were never issued, how can there be a claim for money? Because at most, there would have been a claim -- assuming they'd been issued -- for the equity which would be subordinated. I recognize that there's an inequitable aspect to this and that money is reserved and then never paid. But the money that's reserved and never paid could never be received anyway.

MR. ABRAMOWITZ: I think it's -- well, I mean, it's clear from the statements -- I mean, this is -- these are based on commissions and draw that was earned by the employee. Correct, Lehman had -- it was a part of their compensation scheme to issue RSUs in November. The plan documents are clear that the amount of that is to be determined at a future time.

I think it is decisive, Your Honor, that the bankruptcy intervened. I believe that had Lehman -- forget about a bankruptcy -- had Lehman done a merger, you know, in the interim; had they terminated the employee; there'd be a -- had I represented a client in that context, I would have said this is the money, you never gave me the RSUs, so this is not a question about whether it vests because of a voluntary termination or not. This is simply pay.

Normally, in the normal course, the employee is happy; the company works; and it's understood, we'll get those RSUs. If the stock price happens to be down, we'll get a lot of RSUs when they're issued; if the stock price is up, we'll get less. But we will, at that point, become someone who benefits from or risks that of being an equity holder. I don't know if I answered your question. I see your perplexed --

THE COURT: Well, I am perplexed --

MR. ABRAMOWITZ: -- expression.

THE COURT: -- only because I'm not sure I know how this works --

MR. ABRAMOWITZ: Okay.

THE COURT: -- in practice. Is there a scheduled deduction that occurs with each commission payment that's otherwise due that is set aside for purposes of purchasing the RSU? Is that how this works?

MR. ABRAMOWITZ: I don't believe that money is literally put in escrow. And we're not making a constructive trust fund. There is, though, a deduction from the compensation amount that is reflected. In other words, the net cash paycheck that someone gets is net of what the deduction is for, what I'll call, anticipated RSUs. But the key is that it's anticipated. And in the normal course, people know that at the end of the year they're going to get -- you know, if the board acts and nothing happens in the meantime, they will get

those RSUs with the rights and vesting and risks attendant to that.

THE COURT: But that to which there is an entitlement is something which is, if received, is subordinated?

MR. ABRAMOWITZ: If the RSUs were received -- and I'll give deference -- I'm sure other counsel will argue what the rights of an RSU holder are -- but if those RSUs had been issued, we'd be having a different discussion. I would not -- then I either would be arguing or not whether those RSUs themselves are claims. And I think the argument that counsel for the debtors would made is well, when you got those RSUs, if the stock went up the next day, you benefited; if it went down the next day you didn't benefit. But I'm not making that argument because they were never issued.

THE COURT: So your distinguishing argument is these are claims based upon RSUs that were never issued, and so they should be treated as claims?

MR. ABRAMOWITZ: Essentially. But the key point is, it is compensation that Lehman withheld basically as a security device to make sure the money would be there. So it's really compensation. But the key distinguishing is, I'm not like the other RSUs, because I never got them. So I want to make it clear that this is a compensation-related claim.

The reason Lehman did the withholding is that they had -- because unlike bonus employees, where they just take it

out of the bonus, for commission employees, they can't do that. They have to do it as the commissions are earned.

THE COURT: Okay. Thank you.

MR. ABRAMOWITZ: Thank you.

UNIDENTIFIED SPEAKER: I don't mean to be redundant, but Steven Abramowitz and Lisa Marcus are part of this as well. I'm part of their group. And it is the exact same issue of funds deducted and no RSUs ever granted. So, I won't take up more of your time.

THE COURT: And do you know what happens to the funds that are deducted?

UNIDENTIFIED SPEAKER: They're withheld. They were withheld from our paychecks, but they were never remitted to us in any way. And we were sort of lumped -- according to Weil -- as a group that owned RSUs. We did not ever get RSUs. The bankruptcy occurred two months before.

If you send somebody for a container of milk, and they don't get it, does that mean that you don't get your money back? You know, nothing was ever purchased. We were never reimbursed or returned the money that was withheld from us. And -- understood, if you owned the stock, that's an unfortunate thing, and most of us lost everything. But if you didn't buy the stock, why are you entitled to hold onto that money?

THE COURT: Okay. I understand the argument.

MR. TOFEL: Lawrence Tofel of Tofel and Partners for Charles Diccianni. We had filed papers. Mr. Diccianni's affidavit -- let me actually -- Mr. Bernstein started, I think with a false premise, and that is, I think the motion starts on the premise of we issued these RSUs and everything then falls from there. As you've heard from counsel, and my client's in the exact same position, there are no contract documents; there are no contracts signed by Mr. Diccianni at all. He was never given a choice as to what to do. They simply take money out of his commissions.

They allocate them to something, which they never issue. And in a court of equity, the debtors' counsel now comes in and says well, if we'd issued the RSUs we wouldn't be standing here. Okay. But you didn't. You took my client's money, you didn't give him anything. He had no choice, no rights. And now he's simply relegated to the ranks of a holder of a security that they didn't issue under equitable subordination?

I'm not entirely sure that the debtor would be entitled -- or the creditor's committee -- now, I understand their agendas -- would be entitled to invoke any equity when they didn't act equitably. This is money taken from commission employees, long-term employees who are still there working for Neuberger Berman; monies taken out. They're told what they're going to get; they don't get it. It still is simply sitting

there. I don't know where the money went. There's no agreement. There's no understanding between the parties. It's simply self help when Lehman comes in and takes over Neuberger.

So the money is pulled out of his compensation. And he's left to be told that he is actually an equity holder of a company that he never was offered or actually had equity in? Again, that's the basis of our argument. So I don't think -- to answer Your Honor's direct question -- I don't think Judge Gonzalez's opinion and the progeny of it applies.

That is, the debtor is trying to invoke these principles of equitable subordination with respect to securities that they never issued. There is nothing in this record that Mr. Diccianni ever signed, recognized or anything submitted by the debtor that Mr. Diccianni acknowledge that he was getting stock or agreed to have get stock. He wouldn't have and he didn't. That's our argument.

THE COURT: Okay.

MR. KAPLAN: Your Honor, my name is Eugene Kaplan and I'm from the firm of Kaplan Landau. I represent, in three separate objections, nine managing directors of Neuberger Berman.

And their claim here is very different and has not been addressed either by the debtor or by the creditors' committee, because the debtor, in their response says -- quoting essentially Judge Gonzalez, "In willingly engaging in

the exchange of labor for equity awards, the respondents bargained not for cash but to become shareholders." And as we observed in our papers, our clients were all managing directors of Neuberger Berman at the time Neuberger Berman was merged into Lehman Brothers.

Some of them, at that time, because they were partners in Neuberger Berman prior to it becoming a public corporation, were subject to nonsolicitation and noncompete agreements to begin with. Others, at the time of the merger, became subject to nonsolicitation and noncompete agreements, and in fact, as substantial shareholders, senior managing directors and the like of Neuberger Berman, as a matter of law, could not have solicited or competed with the Neuberger Berman entity that became part of Lehman Brothers.

So my clients found themselves in the position of having developed these tremendous books of business as Neuberger Berman employees, and as Neuberger Berman employees, not being subject to taking half their pay in restricted stock units or the like, and then because of the merger and by no act on their part, being subjected to the Lehman pay structure. And they had no choice but to accept the Lehman pay structure, because had they walked away, they would have forfeited their tremendous books of business and their ability to earn a livelihood, because they had developed -- I mean, as you will see in your papers, some of these people were managing

directors who were in control of six billion dollars worth of business, and by the time Lehman went bankrupt had control of seventeen billion dollars worth of business.

And so they never willingly exchanged their labors for Lehman's pay structure, they had no choice in the matter. They didn't bargain for stock as did the plaintiff or the party -- creditor in Med Diversified. They clearly fall outside of Judge Gonzalez's opinion in Enron and the progeny of Enron. These people never purchased anything. They never were willing purchasers.

They were essentially, because of the merger, put into a pay system that they did not accept, but had no choice -- that they had no choice but to accept in order to continue to engage in the business that they had engaged in collectively for the hundred years previously, and which they continue now, now that Neuberger Berman has been spun out of the debtor and is now back as a freestanding entity. And they continue to do what they do without being subject to a pay structure.

It's for the five years or four years that they were merged into Lehman Brothers, that they were compelled to be a part of the pay structure where half of their compensation was withheld and paid in these restricted stock units. And they have a claim for their compensation. Whether it's a claim for unjust enrichment or a claim for breach of contract, their claim is that they never voluntarily participated in this pay

structure; that this was something thrust upon them. And that distinguishes them quite clearly from the creditor in Med Diversified, the creditors in Enron, and in all the other cases that have been cited by the debtor. And I think that is a significant difference.

THE COURT: It's a definition of involuntary servitude I've never heard before.

MR. KAPLAN: It's not involu -- well, it is involuntary servitude in a way. I mean, if you say to someone, you either can work for us --

THE COURT: But isn't this --

MR. KAPLAN: -- or you can start over. You can give up your life's --

THE COURT: -- isn't this true of --

MR. KAPLAN: -- work and start over --

THE COURT: -- but isn't this true of every -- pretty much every large corporate employer? Because if you are an employee in a large organization, you necessarily lack individualized bargaining rights. You get the benefit of the structure that you voluntarily entered as an employee, but with mergers and acquisitions and the evolution of business in the twenty-first century, where you started isn't necessarily where you end up. And isn't it a voluntary act to stay?

MR. KAPLAN: I would submit it is not, in this instance, where you are -- where your choice is, as a matter of

law and as a matter of contract, you cannot compete and you cannot solicit and you cannot go out and do anything except start as though you had just gotten out of graduate school, and give up the twenty years or thirty years or whatever you had put in at Neuberger Berman. I would submit that it is not. You don't have that choice.

THE COURT: You suggest this is driven by the noncompete provisions of the employment arrangements?

MR. KAPLAN: In part, yes. In part -- in the noncompete provisions of the employment arrangements that either occurred at the time of the merger, or in the instance of a number of the claimants, at the time that Neuberger Berman went public, which was long before the merger with Lehman, when they became -- they couldn't compete with Neuberger, so they couldn't compete once Neuberger merged. And they did not volunteer to become part of this pay structure. They just became part of the pay structure, because they had no choice in the matter.

They could basically retire and give up their life's work or they could accept the pay structure that Lehman thrust upon them. But they didn't have a choice.

THE COURT: Okay. I understand your argument.

MR. KAPLAN: Thank you.

THE COURT: Thank you.

MS. NADRITCH: Good afternoon, Your Honor. I'm

here -- my name is Jordanna Nadritch. I'm from Olshan Grundman, on behalf of claimant, Christiane Schuster. She has filed a claim in this matter -- to help Your Honor facilitate the reconciliation, her claim number is 11369.

Your Honor, my client was an employee in London in Lehman Brothers in Europe for nine years. As part of Ms. Schuster's compensation consideration she received three components. She received cash -- a salary, she received RSUs, and she received stock options.

Your Honor, Ms. Schuster's claim does not address the stock options. Ms. Schuster acknowledges that stock options, as Judge Gonzalez's opinion has explained, are equity and can be reclassified under 510(b) or subordinated under 510(b). The distinction, Your Honor, is an RSU is not a stock option and the debtors' various plans that they filed with the Court as well the ones that actually govern my client, which were not filed with the Court, distinguished between the RSUs and stock options.

They are different vehicles. An RSU is not equity, Your Honor. And I could walk you through that and explain to you, you know, why we believe an RSU is not equity and why Judge Gonzalez's opinion in Enron is applicable to stock options, and not to RSUs, necessarily.

An RSU, Your Honor -- let me just step back one second to make clear, the debtors reply they filed, I think it was a

few days ago, attaches various agreements. Those agreements, Your Honor, don't tie to my client's claim. They have not established how they tie to anybody's claim specifically. There are various agreements, and they've put them forth in the record, but I do have with me today two agreements from my client that I have spoken with last night in Europe that do apply to her claim. And they are somewhat different, Your Honor, than the agreements filed by the debtors.

THE COURT: Let me just clarify. Was your client employed by LBIE?

MS. NADRITCH: Yes. Well, it's Lehman -- it was Lehman Europe, Your Honor.

THE COURT: Lehman Brothers International Europe?

MS. NADRITCH: Yes. And the way it worked is her RSUs were granted through LBHI. That's how all the RSUs were granted, as far as I understand. So her claim resides at LBHI, but her employment was through Lehman Europe.

With respect --

THE COURT: So does she have a claim in the SIPA case or does she have a claim in this case?

MS. NADRITCH: In this case, Your Honor. And, Your Honor --

THE COURT: You'll have to explain this to me.

MS. NADRITCH: Oh.

THE COURT: You have too many affiliates already.

MS. NADRITCH: I'm sorry?

THE COURT: You have too many affiliates already. I'm not sure how you have a claim --

MS. NADRITCH: Well, pursuant to --

THE COURT: -- in the LBHI case.

MS. NADRITCH: -- well, pursuant to Ms. Schuster's employment -- and I don't have the terms of her employment exactly with me, but I do have her equity bonus award compensation package with me -- let's say two years, 2005/2006. The equity awards do resemble the -- in similar function, programs filed by the debtors, but they are different.

But it's no -- it should be of no issue whether her employment was in Europe or in America. The way the RSUs were granted, were granted through Lehman Brothers Holding, Inc. They were granted through the U.S. entity. Her statements came from the U.S. entity. Her employer happened to have been in London, but her statements came in her -- her RSUs were through the U.S. entity.

With respect to the RSUs, Your Honor, I mean, what I was alluding to earlier was that an RSU is different than a stock option. An RSU is not a grant on the first day. A stock option is a grant on the first day. An RSU is a conditional or a contingent grant that vests in five years' time. And it can't be sold, it can't be pledged, it can't be transferred. The agreements all state that.

And the agreements all distinguish between an RSU and a stock option. I think the debtors, in their -- even in their reply, tried to carve out -- in their attempt to explain why an RSU was equity, they explained how the exception to equity is a right to convert. And in explaining how -- the exception to the right to convert, they note that, for instance, a convertible note is the exception, as a convertible note is convertible into equity, it's a right to convert. And that's an exception to 101-16.

Well, I think, Your Honor, an RSU is exactly that. It's exactly a convertible note. It's the exception to 101-16. It's a right to convert. Whereas a stock option, actually, Your Honor, is listed in 101-16(c), I believe, where it says it's a right to purchase. That's not what an RSU is, Your Honor. It's not what my client held. They held a right to convert. And that's why I think, in the first instance, it's completely distinguishable from a stock option and Judge Gonzalez's opinion in Enron.

You know, as a second matter, Your Honor, there was opportunity, actually, for the RSUs to be paid in cash. Specifically, upon a friendly change in control, the RSUs could be exchanged for stock or cash. And I'm not here to argue whether the bankruptcy and the sale of assets to Barclays or whoever else was a change in control -- a friendly change of control -- but there was that ability.

So despite the debtors' contention that it could never be paid in stock, in fact, my client's agreements do provide upon a change of control -- a friendly change in control, there could be the option to receive the RSUs in cash.

You know, separately, Your Honor, my client's agreements don't contain any subordination provisions, unlike some of the other agreements filed by the debtor. But to really hone in on Your Honor questions, do -- even assuming, arguendo, that 510(b) even -- you were to look at 510(b) in relation to RSUs, assuming you could argue it's a security, which, Your Honor, I don't believe it is a security, because it's excepted under 101-16(c) and 101-49 -- what my client is seeking is not damages. It's seeking simply compensation.

It's not on account of fraud. In Enron, those particular employees were seeking damages on account of the fraud perpetrated by the company, by Enron, and were seeking damages on account of those stock options. My client's not alleging fraud; she's not alleging breach of contract claims or tort claims. She's simply seeking to receive the compensation that she believes she is owed, on account of her employ. And I think that's a very large distinction between the Enron decision and where we are today.

THE COURT: Okay. Thank you.

MS. NADRITCH: Thank you, Your Honor.

THE COURT: Before we proceed further -- and I'm not

cutting anybody off -- I'm recognizing that it's 1 o'clock, and there's still a number of people who wish to be heard. I think we're going to need, at some point, to take a break or to talk about a rescheduled hearing.

I think it makes sense before talking about a rescheduled hearing, to take a break and then my suggestion is that we break until 2 o'clock. As you heard if you were listening this morning, I have a 3 o'clock chambers conference that I've scheduled. I'm going to take a break at 3 o'clock. Whether I come back at 4 o'clock or we come back another day, I don't know.

But this has turned out to be a much longer and, I think, difficult to manage a process than certainly I had contemplated. I'm going to suggest that debtors' counsel give some thought during the lunch break as to how best to manage what I think has the potential of being an unmanageable day.

We'll take a break till 2.

(Recess from 1:02 p.m. until 2:06 p.m.)

THE COURT: Be seated, please.

MR. BERNSTEIN: Good afternoon, Your Honor. Mark Bernstein from Weil Gotshal on behalf of the Lehman debtors. As you suggested, after the morning session, we discussed with the creditors' committee and considered how best to proceed. And we still believe that since there are, we think, mainly common issues, we think we would like, if the Court is willing

to try to get through them before 3:00. We believe --

THE COURT: Well, here's --

MR. BERNSTEIN: -- at some point, the issues are going to start to be repetitive and --

THE COURT: We're here and I think we should do it. I've given some thought to the presentation thus far. And I have a thought I'd like to share before we start.

It occurs to me that while it's true that the burden has shifted to the claimants as a result of the showings made by the debtors, there's at least in my mind, and I don't know if it's in the mind of others, some confusion as to how the omnibus response applies to each particular claim. And I think it would be useful, certainly to the Court, if the debtor were to provide an annotated supplement or some further briefing in which the position that is broadly expressed is applied with particularity to individual claimants.

I also think that it would be useful for the claimants themselves to have an opportunity to respond. So what I am suggesting is what amounts to another round of relatively concise supplemental papers on the subject so that arguments such as those that have been made thus far today can be more grounded in the particulars.

MR. BERNSTEIN: Sure. Happy to work and provide that to the Court.

THE COURT: Okay. And it seems to me that some

schedule might be worked out where the claimants themselves that would have a common date for not only your supplemental pleading but thereafter for those claimants who wish to respond in writing to have a date when that will occur. Otherwise, that opportunity is waived.

MR. BERNSTEIN: Okay. We can work into the pleading and establish a response deadline, a reasonable response deadline as well.

THE COURT: Okay. And I think that some kind of notice should probably go on the claims docket so that for those parties who may be appearing by telephone or may have had to leave because this turned out to be a fairly prolonged day, they'll have a chance to know what you know --

MR. BERNSTEIN: Absolutely.

THE COURT: -- about what I've just said.

MR. BERNSTEIN: Certainly. We will get that done. One point I wish to just correct for the record and then I'm happy to let -- we can continue with the responses from the various claimants. The last attorney who spoke, she was the attorney for Christiane Schuster. She had provided us with additional documents, program documents, which Lehman did not previously have. We've taken a look at these throughout -- during the lunch break. And just to clarify one thing she said, she implied that there was language in these documents that said that claimants were entitled to get cash or could get

cash in exchange for their RSUs. The only place this refers to receiving cash is if there's a friendly change of control. And in that circumstance, it is Lehman's decision whether to pay cash or equity in exchange for those RSUs. There is no right or entitlement to cash.

So, other than that, I'm happy to hold my responses till all the other arguments that have been made until we go through all of them.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: I just want to request that we -- I'm not here as an attorney and you've heard from attorneys. Could you hear from someone who is a claimant and directly offended?

THE COURT: Oh. We're going to hear from everybody who wishes to say something assuming we have time. And if we don't have time and there are people who still wish to be heard, we'll have another hearing date.

UNIDENTIFIED SPEAKER (TELEPHONICALLY): Well, what is the cue for telephonic appearances today?

THE COURT: I'm sorry. What was that about telephonic --

UNIDENTIFIED SPEAKER: Forgive me, Your Honor. What is the cue or the order in which you will hear telephonic appearances since we're not there to see the line

THE COURT: Well --

UNIDENTIFIED SPEAKER: -- of the creditors' attorneys?

THE COURT: -- I think that in order to deal with the people I see before I deal with the people who are unseen, everybody who is in the courtroom will come ahead of everybody who's on the telephone. And then once we get to those who are appearing by telephone, you're going to have to first identify yourselves in advance. I'll take down notes as to who's on the phone and we'll determine some appropriate order.

UNIDENTIFIED SPEAKER: Thank you.

MR. MICHAELSON: Good afternoon, Your Honor. Robert Michaelson. I represent three claimants: Morgan Lawrence, Nicole Lawrence and Brian Monahan. And I have three comments to make and I'll be as brief as possible. The first one is really procedural. I represent another claimant who has RSU claims under the 185th omnibus objection which is not being heard today. His claim is more -- is broader than just the RSUs. Now I spoke to Mr. Lemons at Weil and he explained that it was only RSU claims today. If a claim -- if I heard him correctly, the reason other claims are not being heard is because they involved other issues. However, to the extent that there others besides my client who has RSU claims, it would seem that it's necessary to tie everyone in since they're going to have their say in this as well. And so, I'm posing that as an issue. I don't mean to overcomplicate this, but if we're going to be talking about the RSUs, they should be all of

the RSUs not just those people who were noticed for hearing today.

THE COURT: Well, I'm not sure I know what you're requesting. Are you proposing that there be another hearing at which time everybody that has an RSU claim will have an opportunity to be heard and it will be, in effect, a continuation of today's hearing or are you proposing that to the extent that there is a determination that applies to the class of holders of RSU claims, it will apply to everyone?

MR. MICHAELSON: Well, I would prefer if it didn't apply to everyone, I can only speak for my client. I would think that someone would want their day in court. To the extent that a determination is made, it's going to become the law of the case and they'll be effectively precluded from being able to argue their position. Now with respect to my client, I'm going to be arguing -- making the same arguments for all of them. So he's not affected by this. If debtors' counsel tells me he's the only one other than -- who's affected by this, that's one situation. But if there are others, I would think that we run the risk of having a ruling that people didn't have an opportunity to participate in.

THE COURT: Well, I'm not sure that that's true but I hear what you're saying. We have a hearing that was noticed with respect to a certain sequence of claims objections that all relate to the RSU claims. The debtor has filed a single

response applicable to all of the claimants who are in court today or had notice at least that this was happening today. The position of the debtor is that -- and they can certainly speak for themselves but I'm going to repeat my understanding of their position. Their arguments with respect to entitlement apply to an entire class in much the same way that Judge Gonzales' decision in Enron, by its own terms, applied to an entire class of claimants. For that reason, there will be issue preclusion and there will be a result that is binding assuming either to determine that there is a proper class-wide disallowance of all of these claims or a subordination of these claims to equity. So that issue is out there.

Whether or not an individual claimant has the ability to distinguish its claim and, in effect, obtain separate treatment, that's what we're doing today. If someone else that didn't have notice of today's hearing or is subject to a different omnibus claims hearing schedule, presumably that opportunity will exist to present separate and independent argument at that time. But those arguments may be trumped to the extent that I were to determine in the context of today's proceeding that there is class-wide preclusion.

Have I responded?

MR. MICHAELSON: You have, Your Honor. I'd still be concerned that perhaps there is an attorney representing some claimant out there who has a take on this that the rest of us

don't have that might be persuasive to the Court and that would affect the ultimate outcome. I think that what's represented here today is probably in all likelihood pretty much the universe of arguments that would be raised. But I don't pretend to know everything. And I don't think most of the people here do. And so, I lay that out as a possibility. Whether it's real or not, I don't know. But I just mention it because I was aware of that situation with my particular client and I thought it should at least be brought to the attention of the Court.

THE COURT: Thanks for bringing it to my attention but I think what we're going to deal with is what's before us --

MR. MICHAELSON: Okay.

THE COURT: -- instead of what might be out there.

MR. MICHAELSON: I appreciate that, Your Honor. I will be brief. Two substantive points. The first one has to do with the Enron case. As Judge Gonzales said, that case was limited to the facts presented to the Court. And one of the facts presented to the Court involved an agreement that was a precursor to employment. There was also a fraud element but it was a precursor to employment. In this particular instance, it was not a precursor to employment. There was no bargain in the sense that that term is used as an equivalent of a sale. These were well compensated employees who were given what amounted to a take-it-or-leave-it choice. There was no bargaining whether

in the legal sense or in the generic sense. They were told that if they wanted to maintain their employment, they had to do this. Now to the extent that Judge Gonzales has said that his case was limited to its facts, that is a material distinction that I think must be noted. And in the other cases, most of the other cases, cited by the debtor, there was a prior vesting that would distinguish it. There was no vesting in this particular case. These employees were told take it or leave it.

Now Your Honor made a very good point which is you can walk. You can vote with your feet. You don't have to stay there. But I would say that that is a very weak bargaining position if it's a bargaining position at all. And I think this sounds more like a classic contract of adhesion in the sense that everything was set up. There was no choice. It was, as I said before, take it or leave it. Employees were highly compensated. They did not want to lose the valuable position they had. And so they were, in essence, tied to this company through this agreement until such time as the vesting occurred and they could realize the gains from the commissions they had that were deferred.

So I think that Enron is not controlling in this particular case.

THE COURT: Well, your particular clients, what were there positions with Lehman?

MR. MICHAELSON: They were commission salespeople.

THE COURT: Not Neuberger Berman people?

MR. MICHAELSON: They were not Neuberger Berman people.

THE COURT: So they're more like the people described right at the outset of the hearing this morning when we were talking about a commission claim and stock that was not issued because of the intervention of the bankruptcy? Is that what we're talking about?

MR. MICHAELSON: That is correct. Essentially, the company came to a crashing halt. And whatever hope they had of ever realizing on that vanished. The stock was simply not going to be issued. Now there are really two components of that. There was that which was taken prior to 2008. And then you've heard the arguments before that there was money that was paid over from 2008 and not invested in any particular fashion. And in speaking to my client during the break, he mentioned to me that there were terms and conditions under which money that was withheld during that period before it was invested would be returned to the employee in the form of cash if the employee left the employment before that took place.

So that's a distinction as well. So you have to divide these into two components. 2008, where there was an opportunity and, according to my client, a history of cash being returned to employees under certain circumstances. And

you have the prior period where you -- money was taken, presumably never actually invested in the stock but merely just taken and held in a form that we've never been clear about.

So --

THE COURT: It's very difficult for me to deal with what you just said for purposes of today's hearing. You're making a hearsay statement as counsel. I don't know how to deal with it. It's not evidence of anything yet. I don't know whether or not you're proposing a declaration of your client to supplement the record with respect to this issue with some specificity as to how it ties to the claim.

MR. MICHAELSON: Yes, I am, Your Honor. I gave thought to that issue because I realized that my statement or my client's statement is not evidence that this Court can rely on to make a ruling. But there are two options here. One is a declaration from my client. And the second is, in the context of this contested matter, applying the adversary rules and allowing depositions to be taken to determine what money was spent -- how -- where the money was put, under what terms and conditions money may have been released that may have indicated that it was something other than what it might have been labeled or appeared to be.

So I think there are legitimate questions about the interaction between the parties. I think, expanding on that, there's a legitimate question as to this whole issue of whether

a bargain was struck. We've heard a lot of talk about their having been -- this being bargained for. And you've heard me say and my client has said and others have said that there was no bargain. This was a unilateral imposition of a new policy in which they had no say. The debtor has a slightly different view of that. Well, that's a factual question that, from the presentations today, I would find it very difficult for the Court to opine on.

But this may be fundamental to the very issue that we're talking about in the spirit of what Judge Gonzales said in Enron, that there are -- he said he couldn't imagine that there were circumstances. But he didn't preclude them. And he also said that his ruling was limited to those specific facts. I think that we may be in that very narrow range where we have an opportunity here to reach a different conclusion. But I think that the facts have not been fully investigated and expanded upon and certainly not sufficient to inform the Court, in my view, of what really went on in this case.

THE COURT: Okay.

MR. BERNSTEIN: Thank you.

MS. SOLOMON: Good afternoon, Your Honor. Lisa Solomon. I represent eight claimants: Mr. Gordon Sweely, Vincent Primiano, Riccardo Banchetti, Giancarlo Sarrone, Harsh Shah, Philippe Dufournier, Charlie Spero and Tim Burke. The individuals that I represent in this case, Your Honor, some of

them worked in the United States and some of them worked outside of the United States. So the individuals who worked in the United States have asserted claims under RSUs. And the individuals who worked outside the United States have asserted similar claims under the contingent stock arrangements.

Your Honor, the claims that have been asserted here, and the debtors haven't contested this, are claims for unpaid wages. They were issued under a stock incentive plan for all of the claimants. And the claim for unpaid wages arises under Delaware law as well as the Bankruptcy Code. The stock incentive plan which hasn't been referred to in any of the debtors' documents is a pivotal document here, not necessarily the grant agreements which were issued after the stock incentive plan. And the stock incentive plan in paragraph 8 specifically provides that nothing herein shall give any participant any rights that are greater than those of a general creditor of the company.

Your Honor, it's submitted that -- it's acknowledged here that they did have the rights of a general creditor of the company and that they did not -- and that the claimants did not have rights as shareholders. In fact, that paragraph 8 goes on to provide further that the participants shall not have any rights of a shareholder of the company with respect to shares subject to an award until the delivery of such shares.

The claimants have claims for unpaid wages. And in

fact, Your Honor, it's our position that certain parts of the claim are entitled to priority wage treatment under the Bankruptcy Code and that their wages under Delaware law as well. Your Honor, it's been submitted that this is very significant here because, as far as I know, there isn't any prior case law that has construed Section 510(b) and, in particular, the Enron case did not address this issue where a claimant was entitled to priority wage treatment and at the same time, it was found that that claimant's claim could be subject to subordination under the Bankruptcy Code under 510(b).

THE COURT: What's the basis for asserting that any of your clients are entitled to priority wage treatment?

MS. SOLOMON: Because the RSUs and the CSAs that were issued were on account of services rendered within 180 days of the bankruptcy filing. That's the basis, Your Honor. And it's submitted with respect to other case law that has been cited in the debtors' filings dealt with terminated employees not current employees who are continuing to render services. And that Congress found it appropriate to grant priority status to claimants for their services rendered is significant here.

THE COURT: Well, how do you deal with the distinction between the payment of cash and the payment of the right to receive equity?

MS. SOLOMON: Well, first, I would note also that

while the debtors were not under an obligation, the debtors reserved the right to pay in equity or cash under the stock incentive plan. And so, the claimants were not guaranteed just that they would receive equity upon the satisfaction of the conditions. But it was possible that they would never receive any equity. And whether or not the debtor was obligated or it was in the discretion of the debtor, I don't consider it to be that significant. The point is that these claimants did not know at any time that they would be an equity security holder of the company.

What we're talking about here, Your Honor, is basically a categorical reordering of a priority claim that was granted by Congress under the Bankruptcy Code. And I say categorical reordering because it's the same set of facts that give the claimants a priority claim that makes their claim according to the debtors subject to subordination under Section 510(b). And it's submitted that there's no basis for a categorical reordering of their priority claims.

The fact that their claim is tied to the price of the stock doesn't change the underlying nature of the claim. And that is, it's a wage claim for unpaid services, for services that were rendered but that they didn't receive payment on.

Your Honor, I would point out also that the factual background with regard to various of the claims is different. And some of my claimants started employment with Lehman --

Lehman Holdings more than twenty years ago. And at that time, Your Honor, there was no equity package whatsoever. They were privately owned. They were owned by American Express. And over the years, that changed and slowly equity compensation was worked into the formula. And the portion of their equity compensation was increased over time. But this isn't a situation, as has been described by the debtors, where, from day one, there was a contract in place and my clients agreed to certain terms. That's just not what happened here. Eventually, at the end of the day, their compensation was based in part -- was up to the equity comp -- a portion was up to practically forty percent. But that was very, very different from what it started out at the beginning of time. And if they were to leave at any point in time, they would therefore have forfeited the prior equity compensation that had been previously earned. And while, Your Honor, I don't consider that necessarily to be involuntary servitude, I don't, at the same time, consider that to be a fully bargained for agreement.

I'd like to point out further, Your Honor, that the terms of the RSUs and the CSAs were universal within Lehman. And this was not a situation where there was a single private agreement reached with one particular claimant. But this was the universal employment policies of the company. And I believe that that makes this case very different from any of the prior cases that have been cited dealing with terminated

employees and severance packages that they may have reached with the debtor in those particular cases. And I would also point out that the claims that have been asserted here are not based on diminution of value of stock. They're not damage claims for diminution of value of stock. They're wage claims for the wages that my clients had earned but were not paid because the debtor deferred it and then said I'll pay it in the equity portion down the road.

So to the extent that which Cong -- 510(b) is very clear, the debtors have to show that we have a damage claim arising from purchase of a stock. We don't have that here. It's not based on diminution of value of stock but rather based upon the compensation that my clients earned prior to the bankruptcy filing.

I would also point out that, Your Honor, in certain cases there was guaranteed compensation that was put off in terms of the equity compensation. It was described as guaranteed compensation -- and this is in our papers, Your Honor. It was described as guaranteed compensation and referred to as guaranteed compensation. In one or more contracts between my clients and the debtor. And not only is that compensation now not being paid to them, but they're told that they can't even make a claim and get the same rights as general creditors in the company for that guaranteed compensation. That's it, Your Honor.

THE COURT: Okay.

MS. FLACKMAN: Good afternoon, Your Honor, and members of the court. My name is Cynthia Flackman. I'm representing myself, I'm not a lawyer, in the matter of claim 4709. And I submitted a response to the 131st objection to my claim. And I believe I made a number of meritorious statements and stated facts related to certain legal precedent in that filing and the filing of my response. But I do not want to reiterate that filing because of my respect for your time, Your Honor.

I would simply like to state that notwithstanding the fact that the debtors' objection has aptly described the nature of equity securities and related instruments that may be broadly categorized as equity securities, the debtors' 131st omnibus objection to claims is without merit with regard to my claim because it is entirely based on the intended form of payment and does not address the substance of the liability to me as creditor for unpaid wages.

Whereas, as creditor, I adjusted the amount of the RSUs that were published in the LehmanLive RSU summary, and I specifically removed the 2008 grant that was not incorporated in any of my compensation statements, the RSU values that I am categorizing as my compensation were stated as my compensation for the year, salary plus bonus. There's a footnote about RSUs in the statement and any amount of the bonus that's paid in cash is stated and separated from the equity.

But whereas the compensation total was presented in this way, regardless of the categorization of equity and the kinds of -- the types of precedents that deal with these types of securities, I don't think it really addresses the other side of the balance sheet, my claim. The consideration that would be offered to settle my claim and whatever that consideration is, it has a variety of financial characteristics but I don't think it settles my claim. And because I made this adjustment, I feel I have distinguished my compensation claim from the generalities of RSUs.

I would also like to state that it was somewhat painful to see references to Enron and WorldCom. Excuse me, Your Honor. I find Lehman as an entity that I always felt tried to do the right thing. And legal precedents can be set that are either good or bad. And sometimes we can rely on bad precedent and come out with bad laws or bad decisions. But there always was a remedy starting with Magna Carta and the foundation of our laws was a remedy, equitable remedy. And I would like to respectfully petition the Court to grant an equitable remedy to me in full settlement of my claim.

My claim was part of reasonable compensation. It's not millions of dollars. If you were to look at the compensation that a person would be paid for the job and the hours that I worked, I feel my claim was very reasonable. And I would like to ask for an equitable remedy. And I have

brought paperwork which I'd like to approach the bench with to submit my request for an equitable remedy which I think distinguishes me from the other claimants.

THE COURT: Before you hand that to me, I just want to make sure that the debtor knows what it is that you're handing me.

MS. FLACKMAN: Oh, yes. I have it for them also. And I have it for the --

THE COURT: Okay. I'll take a look at it.

MS. FLACKMAN: Sorry.

THE COURT: Okay. Thank you.

MR. KENNEY: Your Honor, my name is Arthur Kenney. I am not a lawyer. I was a twenty-five year salesman at Lehman Brothers and a commissioned salesman at that. Similar to the first couple of colleagues who -- or representatives who spoke, again, I was a commissioned salesperson. And like my colleagues, a portion of that commission was accrued to purchase RSUs at the end of the year when the price would be set. That was similar to what I think of it as a convertible debt obligation with the conversion price to be determined at the end of the year. On the first of July, 2008, twenty percent of the accrual was used to purchase, in my case, 1416.06 RSUs at a price of 20.96.

My claim, as my colleague who just preceded me, consists of the accrued commissions minus the amount of the

commissions that were granted in RSUs for that July 1st purpose. So my claim is the net outstanding accrued earned commissions that I argue should not be reclassified as equity. I assert that these owed commissions are -- remain as debt as convertible debt which cannot be converted. So that's the claim that I am making.

THE COURT: Okay. Thank you.

MR. KENNEY: Thank you for your time.

MR. PLASKETT: Good afternoon, Your Honor. I'm Rodney Plaskett. I'm one of the claimants. I actually did practice law for twenty years -- for ten years. For the last nineteen, I've been an institutional equity research salesperson.

I was going to ask for your indulgence if you might read back the first couple of sentences of your statement that you had earlier today.

MR. BERNSTEIN: I'm not exactly sure what you're --

MR. PLASKETT: Just the first couple of --

THE COURT: What is it you're asking for?

MR. BERNSTEIN: What are you trying to --

MR. PLASKETT: I'm trying to recall your first couple of statements which I did not feel were at all true.

MR. BERNSTEIN: "The objection seeks to reclassify the claims as equity interests. Part of the commencement, LBHI granted RSUs to employees as part of their compensation in order to enable employees to participate in the increased value

of Lehman by enabling them to receive common stock. The RSUs bear the hallmarks of equities. The holders' benefit an increased value of the corporation, receive dividends and bear the risk of failure of the corporation.

MR. PLASKETT: Thank you. The compensation I'm seeking today is a defined amount. It's about 60,000 dollars. And that was not compensation to me. That was -- that Lehman gave to me. That was commissions that I earned. I was not a salaried employee receiving a bonus. Okay, Rodney, you did a great job this year. On top of your salary, we're going to give you X dollars. No. Every day I come in, it's zero. And then I earn X; I'm paid Y. And out of that Y is taken a portion. It's called a holdback. That holdback can be used for whatever the employer deems fit. If I have a bad trade that goes against me, they can take some of that money. If I misstate how a trade should be executed, they can take that money. If I do a deal and there's a penalty bid -- a penalty bid is when one of my clients decides to flip a hot stock. They can take that money.

So Lehman goes bankrupt and I get my monthly statement. And I see I have made X. And there's another line that's got 60,000 dollars in it. And that 60,000 dollars is definable as cash and as a holdback. It's my compensation. Every single commissioned salesperson on that desk can point to a number that was still cash.

Lehman goes under. We get an e-mail from Barclays: accept or decline employment. We accept employment. We go to our management. Okay, guys. We realize the RSUs may be zero but where's our defined commissioned money we saw on our last statements? I don't know. Don't ask us about it. So, I mean, why? None of the management changed. They just changed from being Lehman management to Barclays management. Where was that sum of money? It's definable; it's in writing. I submitted it with my petition and I would really love to get it because I could have lost it for trading errors, for penalty bids, for whatever Lehman -- if Lehman wanted to give me Hess trucks for Christmas, they could have said, well, that's what we bought with that money. But that money was definable compensation, definable commission revenue.

RSUs were not part of the bargain of my working at Lehman. As a commissioned salesperson, once again, you started at zero and you earned your commissions every day, every month. If I had been let go without cause, I'm willing to state that, Rodney, we're going to scale back this month. So here's the money we were holding back from you because it's not time to deliver RSUs. Thank you very much, Lehman management. That's fair. I earned it. You see it. It's right there. It's not time for RSUs so it must be in cash.

THE COURT: Can I ask you a question about --

MR. PLASKETT: Yes, sir.

THE COURT: -- at least how your situation with Lehman was documented? Was there a set of procedures or terms and conditions of your employment as a commissioned salesman that laid out what Lehman could do with funds that were held back from your salary?

MR. PLASKETT: No. It was the opportunity that maybe we'll give you RSUs. But other than that, no. So any monies that I earned, they could have used in any manner they desired. That's the power of that man -- of any management, often. But, no. There was no contract other than you may have a -- you'll have a holdback, could go with the RSUs, could be used if you screw up, if you blow a trade. And those things did happen.

THE COURT: Okay. So do I understand that, at least in your experience, and perhaps this is similar to the experience of other commissioned sales personnel, that there was a separate accounting sheet that was created on a monthly or quarterly basis that laid out what you had earned in commissions and that set aside a certain amount which was disclosable on the form that showed what was being held back. Is that correct?

MR. PLASKETT: Yes, sir.

THE COURT: And was it ever the practice of Lehman, to the best of your knowledge, for the funds being held back to be paid to the commissioned salesperson in cash at the end of a year? Was it ever a fund that you could tap into?

MR. PLASKETT: I could not tap into it.
THE COURT: You did not?
MR. PLASKETT: I could not --
THE COURT: You could not.
MR. PLASKETT: I could not tap into it.
THE COURT: And is it true that no one could?
MR. PLASKETT: No. Management could tap into it.
THE COURT: No. But none of the commissioned salespeople had a right to tap into the fund?
MR. PLASKETT: Correct --
THE COURT: Okay.
MR. PLASKETT: -- to the best of my knowledge.
THE COURT: All right. Thank you.
MR. PLASKETT: So I stand here once again, reiterating my claim for a definable amount of cash that was earned commission, that was income that I feel has been, first of all, channeled to import -- to incentivize the management that was retained by Barclays as commissioned salespersons, none of us received retention bonuses. There were two sales forces at Lehman. One which I was in was Little Markets; and another which was called Portfolio Sales. They were supposed to cover the top 200 accounts in the country. And they were on salary plus bonus. Many of those individuals received retention bonuses. None of us in commission sales received a dime.
So, in other words, I do feel as though I've been

defrauded because the amount of money is quite clear has been with my file. I don't have the financial wherewithal at this time to retain counsel. I have to act as my own. But I do hope that as you review the many commission salespersons' complaints that you will look at them from the standpoint of those who did hire counsel to extract favorable case law. And at least for those of us who decided to take the time to put in a claim, to give it the benefit of some of those common filings.

I believe that really does sum up what I had to say here today and I really thank you for your time.

THE COURT: Okay. Thank you very much. Before I hear from the next individual, based upon what I've heard to this point, I'm concerned about the lack of a formal evidentiary record here. And I don't think we're going to solve the problem this afternoon. It seems to me that this is taking on a character that's somewhat similar to a matter that I recently decided in a totally different context in the LBI SIPA case that involved -- and it's a reported decision, claims with respect to so-called TBA contracts. And I'm thinking of it because, in that setting, I at least had a record because the parties stipulated that certain declarations and attachments to the declarations could be accepted as reliable and authentic evidence that I could refer to for purposes of decision making. And what I am finding as a result of this hearing up to this

point, and we're not done, is that there are issues of fact that are being referenced in a very credible way by individuals who are not under oath, who are not subject to cross-examination and who are in a position to influence the Court.

So I'm troubled by where we are right now in this proceeding just as a pure matter of case management and administration. I haven't opened up this envelope which was handed to me but I will. But I'm not sure what I'm supposed to do with it once I read it.

I think, as a result, that we need to do a better job managing this process so that I can make some judgments about particular claimants within what previously has been characterized as a class. And it seems to me that I have already heard enough to know that there are subclasses within the class and that one subclass would be commissioned salespeople who had funds held back and accounted for but, as just stated, did not have the ability to access those funds but nonetheless those funds represented what they could, with a straight face, characterize as earned commissions.

I also have heard just before the lunch break from an attorney who represents individuals who had been working at Neuberger Berman before the acquisition and presumably are still with Neuberger Berman and who explained their terms and conditions of employment were changed as a result of the acquisition by Lehman but that by virtue of the economic

reality of their practices, were held captive by economic coercion. It wasn't anything that willful; it was just circumstantial.

I think that both of these examples, and I'm not limiting the field to these examples, raise some questions as to what the facts actually are. And it further raises a question in my mind as to whether we can deal with this in so undifferentiated a way as we have started to deal with it this afternoon. So that's my mid-course reaction to what I've heard so far in terms of whether or not we're in a position to make some decisions. And I don't mean to cut anybody off. I think that we've reached just about five minutes to 3. And I'm going to have to take a break for the chambers conference which will be starting at about 3:00. Is there someone --

UNIDENTIFIED SPEAKER: Yes. Your --

THE COURT: I see someone standing --

UNIDENTIFIED SPEAKER: Right.

THE COURT: -- in reference to --

UNIDENTIFIED SPEAKER: Your Honor, that chambers conference -- the parties are talking and then respectively talking to their business principals --

THE COURT: Could you come forward --

UNIDENTIFIED SPEAKER: Sure.

THE COURT: -- only because I can barely hear you.

UNIDENTIFIED SPEAKER: Your Honor, the parties are

talking among themselves. We started talking about twenty minutes ago. And now they're respectively reaching out to their business principals to see if we can get some kind of framework to present to Your Honor at 3. And given that ongoing discussion, we wondered if we could postpone it ten or fifteen minutes if that works for Your Honor.

THE COURT: You can postpone it for a half hour.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: You can postpone it for forty-five minutes. I don't really care.

UNIDENTIFIED SPEAKER: I don't think we need more than, say, twenty minutes. So if you want to say a half hour to be safe.

THE COURT: Let's call it 3:30.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: And are you gathering in the conference room across from my chambers?

UNIDENTIFIED SPEAKER: We can do that. We are in the hall right now.

THE COURT: Why don't you ask my courtroom deputy to open up the conference room which is across the hall. You can gather in there and I'll join you there at about 3:30.

UNIDENTIFIED SPEAKER: Okay. Great. And where can I find your courtroom deputy?

THE COURT: Just walk into the door that says

"Chambers Entrance".

UNIDENTIFIED SPEAKER: Okay. Thank you, Your Honor.

(Pause)

THE COURT: Okay. We've just been given a half hour. I think we should continue to hear from those individuals who are gathered here now and who wish to be heard.

MR. KENNEY: If I could just put an addendum to my colleague, Mr. Rodney? You asked if there was a statement that's an example of a statement that -- and may I show it to you? And you see there are --

THE COURT: I appreciate that there is such a statement and that only serves to further emphasize in my mind the procedural concern that I have which is that we don't have an established evidentiary record to deal with some of the ancillary materials that are being present. And we're going to need to do that before I can do anything with the information that's being developed.

MR. SCHAGER: Good afternoon, Your Honor. Richard Schager for claimant, Michael McCully. And I'm just going to make a very quick point 'cause I'm quite happy with the procedure Your Honor outlined about subsequent sequential papers to be filed before the next hearing.

I thought the fatal flaw in omnibus motion 130 was the way it glossed together and glossed over differences among different plans including stock option plans, the contingent

stock awards and the restricted stock units all of which are significantly different. I think virtually everything that has been said today has dealt with RSUs. I thought I heard one reference to a stock option plan but it wasn't clear to me. So I was going to ask the Court to -- I was going to ask the Court respectfully to clarify whether to the Court's knowledge the 130th omnibus motion still deals with stock option plans and contingent stock awards as well as RSUs or has the relief been granted for everything except the restricted stock units, the RSUs?

THE COURT: We'll have to ask debtors' counsel for that --

MR. SCHAGER: And if they can't be addressed today then I think it has -- I would just flag that I think it's something that has to be addressed in the papers.

THE COURT: We'll have to ask debtors' counsel to clarify that.

MR. BERNSTEIN: Your Honor, the -- it was not entirely clear to us from the proofs of claim if parties were claiming for stock options, contingent stock awards or RSUs. They generally attached -- generally, statements were attached that said how many RSU units they held whether they acquired those through the equity awards program, the contingent stock award program. I think the end result is the same. They end up with RSUs. So the objection addressed everything that was included

on the proof of claim attached to those -- included in those proofs of claim. So if there were stock options included on those and the party had ended up with RSUs, those obviously were included. And if they had something different, that was also included in the objection. So no relief yet has been granted here today but those -- all of those items on those proofs of claim were intended to be subject to the objection.

MR. SCHAGER: Okay. While I'm -- subject to making one brief point, Your Honor, I'd say I'd wait until the next round of briefing. But I think there are -- the Court is going to find that there are, in fact, significant differences between stock options that are granted which represents a real physical act and a restricted stock unit that just, by way of one example, a stock option has a tax consequence. And it might not be taxable at the time of the grant but that's subject to provisions of the Internal Revenue Code. Restricted stock units were never taxed. And it's not clear that there was anything that transpired that would constitute taxable compensation. I think that's going to be the type of difference in these types of plans that has to be addressed. Having said that, though, I'm happy to wait until the next round of briefing.

THE COURT: Okay.

MR. SCHAGER: Thank you.

MR. SHOTTON: Thank you very much, Your Honor. My

name's Paul Shotton. I'm here representing myself as a former Lehman Brothers employee. The offer letter of employment which constitutes the only employment contract I've had with the firm guaranteed a total compensation amount as a dollar figure for the first year of employment. The letter went on to explain that in subsequent years the figure would be variable but referencing the figure for that first year to establish a run rate. And it said that solely at the firm's discretion, part of the compensation made be paid in the form off conditional equity awards. It went on to describe those as being RSUs or stock options or of a conditional equity award pursuant to the employee equity award program then in effect.

Now the terms of the program including the proportion of conditional equity changed from year to year solely at the firm's discretion. I was never consulted nor asked to approve that. And bonus amounts and amounts of equity which were determined at the end of each fiscal year were fixed in dollar amounts not as a particular fixed number of shares and, likewise, when stock actually vested, tax which was due to the Internal Revenue -- to the Treasury -- taxes withheld at source automatically by the firm.

So it's quite clear from the contract letter that the firm viewed the conditional equity awards, cash salary and cash bonuses as being completely fungible quantities. And the deferred equity portion was used solely or principally as an

employer retention device.

The equity awards programs make clear that the RSUs as counsel admits they are immediately convertible into cash albeit at the behest of the firm in the event of a change of control. So I believe that the argument that RSUs are only classifiable as equity is fundamentally incorrect.

And in summary, I'm pursuing a wage claim seeking just compensation for services rendered to the firm in good faith.

THE COURT: Okay. Thank you.

MR. HUTTON: Good afternoon. My name is Randall Hutton. I'm not an attorney. My claim number is 14023 which I initially filed in September 2009.

I filed a response on May 16th of this year to the debtors' 118th omnibus objection to reclassify my proof of claim to equity interest. In doing so, I reduced the amount of the initial claim that I had to only reflect deferred compensation under an employment contract that I had with the debtor. Per my amended claim, I disagree with the debtors' assertion and their objection that the conditional equity awards I earned in 2006 an 2007 under the employment contract is security under Section 510(b) Bankruptcy Code.

I further disagree with the debtors' omnibus reply filed on December 15th to the general omnibus responses as it failed to address my specific claim and my response. As a way of background, I had signed an employment contract on December

10th, 2004 with the debtor which I had included in Exhibit A of my response. The contract specifies a consideration and compensation for my services throughout its term which was calculated annually through a defined formula. Per the contract, Lehman had the discretion to pay a portion of compensation in the form of conditional equity awards which is the amount of my amended claim. The debtor had filed for bankruptcy before any of these were paid to me.

The employment contract called for an exchange of my services for a calculated dollar amount of compensation in 2006 and 2007. Given this was a contractual obligation for a calculated dollar amount and only a calculated dollar amount, the conditional equity portion I received was in form of compensation only, not necessarily ultimate value. My contract states in Section 3 that a portion of my compensation could be paid in the form -- and underline "form" -- of conditional equity awards. This could be interpreted to referring to the deferral investing aspects related to conditional equity but not necessarily its ultimate value. In other words, Lehman was not contractually obligated to hold a certain number of shares to me but rather, needed to provide the amount of stock when vested to contractually fulfill the calculated dollar amount owed under the contract.

To illustrate this point, assume that Lehman did not file for bankruptcy but instead its stock increased in value

substantially. When the conditional equity was due to be delivered to me pursuant to the terms of the contract, Lehman could limit the amount of shares delivered to me to the contracted amount of compensation in my claim. Even though the market value that those shares -- may be much higher, Lehman could argue that under contract and general contract principles, it is only responsible for a contracted amount and not the higher equity market value amount. Thus, I did not necessarily have the upside of an equity investor. Given that the conditional equity I received under the contract was capped under a contract amount and under general contract law principles, it does not meet the Bankruptcy Code definition of "security" as defined in Section 501(b) as the debtor alleges.

The case law is, I think, the similar Enron court opinion regarding employee claims filed on May 2nd, 2006 where Judge Gonzales describes the absolute priority rule in saying that "In return for the right to share in the profits of the corporation, securities holders must also accept the risk of insolvency and therefore precluded from sharing in the distribution of the estate until all general creditors have been satisfied. Security holders thus accept greater risk in return for the opportunity of a greater reward whereas general creditors' bear less risk commensurate with the fixed nature of their award.

Given the conditional equity that I had under my

contract was contractually capped at a calculated amount, it compromised any right to share in profits in Lehman. Per these reasons, the conditional equity amount should not be considered a security per Section 510(b) as the debtor alleges but should be a general unsecured claim against the debtor. Thus, I respectfully petition the Court to deny the debtors' request to reclassify the claim as an equity interest.

THE COURT: Thank you.

MR. HUTTON: Thank you.

THE COURT: Is there anyone else in the courtroom who wishes to be heard? All right. That means that those of us who are still on the telephone will have a chance to express themselves. But the first thing that I'm going to ask is that you at least identify yourself by name if you wish to be heard at this time.

MR. BOYAJIAN (TELEPHONICALLY): Yes. Hello?

THE COURT: Listening.

MR. BOYAJIAN: Yes. This is James Boyajian, law office of A. James Boyajian in Los Angeles on behalf of Jeffrey Wardell, claim number 24545.

THE COURT: All right. You're on the list. Anybody else?

MR. CARRAGHER (TELEPHONICALLY): Yes. This is Dan Carragher for claimant, Fabio Liotti, L-I-O-T-T-I. And I would like to be heard. It's claim number 25895.

THE COURT: I have -- that's two. Is there anybody else on the line who wishes to be heard?

MR. COHEN (TELEPHONICALLY): Darian Cohen from Los Angeles representing myself. The claim number is 16153.

THE COURT: Could I have your name again, please?

MR. COHEN: Sure. It's Darian, D-A-R-I-A-N, Cohen, C-O-H-E-N.

THE COURT: Anybody else?

MR. JACOBSON: Lars Jacobson, L-A-R-S, J-A-C-O-B-S-O-N, claim number 24335.

THE COURT: So far I have four. Anybody else? Okay.

MR. GRAN (TELEPHONICALLY): This is Michael Gran.

THE COURT: Michael -- what's your last name?

MR. GRAN: G-R-A-N --

THE COURT: I couldn't hear your last name.

MR. GRAN: G-R-A-N, as in November.

THE COURT: And are you a lawyer or speaking for yourself?

MR. GRAN: For myself. Claim number 23900.

THE COURT: Okay. Do we have a complete list of five? Apparently so. We'll go in the order in which people spoke up. The first is the attorney who represents Mr. Wardell.

MR. BOYAJIAN: Thank you, Your Honor. The Code aims to protect employees as priority creditors. Jeffrey Wardell was a broker in LBHI's San Francisco office who has a 507(a)

priority claim for $50,638.80 for the extent admissible under the 507 priority status and for the rest of it by general unsecured claim. These amounts are for unpaid wages, benefits and compensation. The money was taken out of his paycheck by debtor LBHI in anticipation of issuing restricted stock units at the end of November of 2008 under the 2008 equity award agreement. The RSUs ultimately could not be issued and do not exist. He got no cash and no RSUs.

We ask the Court to deny debtors' objection because this claim is valid for the following two reasons. Despite Your Honor's mention of the shifting of burden earlier, we believe that debtors' objection does not refute the essential allegations about this claim and therefore does not shift the burden to prove validity of the claim.

And secondly, even if the burden has shifted to us, this claim is valid based on the preponderance of evidence because it arises out of unpaid compensation and requires restitution.

First, the debtors failed to shift the burden because they cite no relevant authority to refute this claim. The case turns, as Your Honor mentioned earlier, on whether not granted RSUs are equity securities. None of the cases cited in the objection or the reply briefs are relative to this issue. In re Enron deals with stock options and phantom stock. To posit three other examples, in the matter of Baldwin-United Corp.

deals with stock option claimants; Curreri v. Jopps (ph.) deals with preferred stock warrants; and Einstein Noah Bagel Corp. deals with puts.

None of these cases as cited by debtors deal with RSUs. RSUs are a completely different animal, Your Honor. They're not equity securities as defined in Section 101, paragraph 16. Even had they issued and invested because RSUs are different from stocks, puts, warrants, phantom stocks and stock options, all of these equity interests give a present right to the risks and benefits of equity ownership. RSUs give only a conditional right to convert to an equity interest at a later point in time and not a present equity interest.

Also, unlike these other equity securities, RSU holders do not enjoy the hallmarks of equity ownership including benefiting increases in entity value, building rights or transferability.

To quote directly from the 2008 LBHI equity award program, RSUs are defined on page 16 as "the conditional rights received one share of Lehman Brothers common stock three years after the grant date on November 30, 2011. Generally, RSUs cannot be sold, traded, pledged or transferred during that three year period."

Unlike most securities, RSUs are easily forfeitable and unvested rights to buy stock many years later only if several contingencies on the -- and as we have heard earlier

this morning, Lehman reserved the right to pay out cash instead of issuing those RSUs. So it's not even certain whether they -- whether the employees will be getting the benefit of RSUs or future common stock if converted. Therefore, Section 510(b) does not mandate that this claim have the same priority as common equity in LBHI.

Not to get to your question, Your Honor, and to the heart of the matter, the Enron case and all of the other cases cited in support of mandatory 510(b) subordination should be distinguished from this claim because they involved stocks and options that had vested. As to footnote 3 in Enron, it is clear that this opinion applies only to stock options. And I quote from that footnote: "To the extent that stock options necessarily implicate the purchase or sale of a security, it is doubtful that any stock options can be so denied."

As you can see, RSUs are not stock options and Enron has nothing to do with RSUs. Even a phantom stock, which is also at issue in Enron, that was not delivered was a present equity interest with expectation of sharing in profits and losses albeit with a deferred date of receipt for tax purposes. In contrast, since respondent never received RSUs and knew of the high risk of forfeiture, he did not expect to participate in the firm's profits and losses.

Your Honor, the only two cases that are on point as to the issue of whether RSUs are equity or whether they are debt

are FleetBoston out of the district of Massachusetts and Diab v. Textron out of the eastern district of Michigan both of which are cited in my response brief. These cases effectively state that RSUs are not equity like common stock shares or stock options. A conditional promise to grant a possible equity stake in the future is not a present equity interest.

Moreover, debtors do not cite any contract provisions which require subordination under 510(a). On pages 8 and 9 of their reply brief, the debtors mistakenly suggest that the 2008 equity agreement contains a subordination agreement to treat the RSUs as "arising from the purchase or sale of a security like common shares in LBHI in the case of a bankruptcy". This term appears only in the 2003 and 2004 equity agreements. It does not appear in the 2008 equity award agreement which governs the amount disputed in this claim. Nothing in the 2003 and 2004 agreements is incorporated by reference into the 2008 agreement. The 2008 agreement that debtors attached in Exhibit B of their reply brief does not even mention the word "bankruptcy". The fact that this language was removed altogether from the 2008 agreement goes to indicate that the parties agreed they would no longer subordinate RSUs as equity in the case of a bankruptcy.

This brings me to my final point, Your Honor. And I'll keep it a quick one. As to my second point, this arises -- this claim itself arises out of unpaid compensation

and not for fraud or breach of contract damages arising out of a purchase or sale of the security that was at issue in Enron. There will be no other recourse to seek these unpaid compensations other than by allowing these claims to proceed. The evidence is clear, Your Honor, Jeffrey Wardell's sworn affidavit and his compensation earnings statement show that this money was withdrawn monthly and held in accrual. He had no cash and no RSUs which begs the question, where is the money. Can LBHI simply take cash out of an employee's paycheck and keep it in return for worthless common stock that was never bargained for and may have never been received through conversion of the RSUs? If LBHI could not possibly issue the RSUs, they owe to their employees to pay them cash back that they withheld under the state labor laws of Delaware as well as New York as well as under the equitable doctrine of restitution.

My client was -- my client's money was withheld as the -- it was money that was consideration for the waiver that he rendered as a broker for the San Francisco office of LBHI. He therefore has a legal and equitable right to payment under Section 101, paragraph 5. As such, it is a valid claim. Your Honor, in summary, we respect ask this Court to use its Section 105 equitable powers to cancel and set aside the 2008 equity award agreement due to impossibility because it could not be performed during the voluntary bankruptcy. The Bankruptcy Code

strongly prefers that employee claims such as Mr. Wardell's remain a 507(a) priority claim. Thank you, Your Honor.

THE COURT: Thank you. The next is the attorney representing Fabio Liotti.

MR. CARRAGHER: Thank you, Your Honor. This is Dan Carragher from Day Pitney in Boston. I'll keep my remarks brief and will avoid pretty much in the way of factual recitation because I think, in light of Your Honor's comments about keeping the record clear, that's probably better provided in the form of a declaration to be considered at a future hearing.

But by brief introduction, Mr. Liotti was employed in London. He holds claims under RSUs that were issued in 2004, 5, 6 and 7 in consideration of over three million dollars of compensation. And he also has asserted a claim which I'd like to speak to today for 2008 compensation that wasn't paid and was withheld and for which he did not receive -- in his case it was CSAs because he was overseas and not in the United States. And that accounts for approximately 950,000 dollars.

What I'd like to focus on is the debtors' argument in their response, point 10 of their Appendix A, the statement that the employees bargained for and willingly accepted a compensation package that included the risks and benefits attended to equity awards in exchange for their labor. And it's true that the employees accepted certain risks, apart from

some of the arguments made, but there were risks of future decline in value, there were risks of forfeiture of the units if there was a cessation of employment and there were risks because the CSAs were not registered securities with the benefits that would entail. They could not be sold, assigned or traded.

But there were other risks that the employees did not accept. They did not accept a risk that when the time came for the issuance of the CSAs in November of 2008 that Lehman would arbitrarily change the bargain under which they had earned their commission income to, for example, issue CSAs of what's half of what they intended or some percent or zero. They did not accept a risk that they would completely forego and waive any right to compensation for the percent of their commissions that was withheld which, in my client's case, was capped at thirty-six percent of the annual income.

Getting right to the point here, they did not accept a risk that in the event it became impossible for LBHI to honor its part of the bargain by issuing equity awards that the employees would be held to theirs. And echoing Mr. Boyajian's comments, I think it's appropriate under the doctrines of impossibility and frustration that the Court should fashion a remedy to protect those employees. We know the remedy will be an imperfect one because LBHI's in bankruptcy and creditors aren't being paid in full. But the fair resolution here should

be to allow a claim for the portion of the commissions earned but which no compensation was ever provided in any form including the issuance of CSAs. For that kind of claim, there's no statutory or equitable basis to subordinate it and we believe it should be allowed in full. Thank you, Your Honor.

THE COURT: Thank you. Mr. Cohen?

MR. COHEN: Thank you, Your Honor. I'll be brief and try not to go over any of the ground that has already been covered. I think, based on what the first speaker said, it's hard to deny that the money was held in 2008 was never invested in anything that could appreciate or depreciate in value, that that didn't happen until November 30th, 2008. And, of course, that never existed because of the bankruptcy.

THE COURT: I'm going to break in just to ask you to speak up because I think your voice is fading and it may not be picked up on the record.

MR. COHEN: Oh, I'm sorry. Is that better?

THE COURT: Just speak up the entire time and we'll see what happens.

MR. COHEN: Okay. So the 2008 money that was withheld clearly was never invested or theoretically invested in anything that could appreciate or depreciate. So that should, as the first speaker said, be treated as a priority claim. However, with regard to the monies that were withheld in the

prior years, it says in the plan documents that the plan is to remain unfunded -- and I'm not going to read the whole paragraph, but it says it constitutes an unfunded plan for long-term incentive compensation. And with respect to any payments not yet made to a participant by the company, nothing herein made shall give the participant any right that are greater than those of a general creditor. It has no right -- we have no right as a shareholder.

But the point is, those plans are rather common. In fact, the company I work at now has a similar plan but you can invest in whatever you want. And in this case, for instance, the company I work in now, if I participated in the plan, if whatever I invested went up a lot -- I work for Deutsche Bank now -- if Deutsche Bank were to go bankrupt, the debtors would not be giving me any value of what my nonqualified plan appreciated to. I would be an unsecured creditor of Deutsche Bank and getting the twenty or thirty cents on the dollar that everyone else gets because the money is never really invested in anything. If it was, it would be like a pension plan and it wouldn't be tax deferred. Part of the reason that they're tax deferred is you are an unsecured creditor of the company that you work for.

So nothing is ever purchased. It's just money that's set aside in an escrow account and that's how it fits as a nonqualified plan. I mean, if I had invested -- if they gave

us a choice of what to invest in and I invested in Apple computer and it went up ten to one, would the debtors then -- I'm sure would then claim, hey, you don't get the value of Apple, you just get -- you're just an unsecured creditor for the value of the money that was taken out.

So it does need to be consistent in that regard. But I see -- that's really the only point I'd make that there are two separate things, the money in '08 and the money prior. However, none of it was ever set aside in any kind of separate account. It was just a general fund of Lehman. And come November 30th of every year, they would issue stock based on a formula of where the stock was then. Thank you.

THE COURT: Thank you. Mr. Jacobson?

MR. JACOBSON: Thank you, Your Honor. Claim 24335. I think Mr. Cohen covered everything I was going to say so I won't repeat anything. So thank you very much for your time.

THE COURT: Okay. Mr. Bran (sic), you're the last one.

MR. GRAN: Well, seeing that I was only last, I -- and also that I think that I concur with many of the other comments being made is something I would say is that I definitely agree with statements that have been made in theory talking about RSUs --

THE COURT: Mr. Bran -- Mr. Bran, I don't mean to break in. I'm having a very hard time following what you're

saying. Something is being lost in transmission. And I don't know where you're calling from or what your telephone service is but you're not coming through loud and clear.

MR. GRAN: Sorry. I'm actually calling from Jordan, using the land lines here. So I am sorry I'm not on the best of lines but hopefully this is better now that I don't have you on speaker.

THE COURT: That's a lot better and I suggest that you speak up.

MR. GRAN: Okay. I was only saying that I definitely concur with those comments made earlier specifically those that are related to the idea that the RSU is not a purchase of a security. The economic value and the way we look at an RSU economically is completely different from an equity security, is a contingent payment of wages that are earned which over time eventually you would be getting essentially a vested interest in your -- in stocks which will eventually be paid to you as stock most likely and then many people would sell those stocks and then your compensation on an annual basis would match what people would say -- what the company would say is your annual compensation for a given year.

So it's a great way for companies to manage cash flows, to reduce tax and to work on employee retention, but it has nothing to do with giving an economic interest in the company over the period invested in those RSUs. It was a way

of deferring compensation which had an economic benefit to the actual shareholders not to mention the debt holders of the company.

THE COURT: Okay.

MR. GRAN: And I'll save any other comments for whenever we get to the next stage.

THE COURT: Okay. Thank you very much. Is there anyone I've left out who wishes to be heard? Good. I think that this has been an extremely useful process of shared education. I've learned some things and I suspect that the debtor learned some things as well.

I think it would be useful for us to follow the plan that I laid out at the beginning of this afternoon's hearing. But by no means am I suggesting that that's the only way for us to proceed. And if upon further reflection, the parties are able to develop a more efficient or productive means to get to the same end, I'm certainly open to suggestions. But I'm going to at least reiterate, first, that there be an annotation or restatement of the debtors' omnibus reply. I'm not suggesting that there be a reply to today's hearing. In other words, I'm not suggesting that you have an opportunity for rebuttal. I presume that at some point you will have that opportunity. I think that the claimants who wish to comment with respect to the statements that are currently on the record by the debtor should have that opportunity once they recognize each and every

part of the omnibus statement of the debtor that applies to their claims.

I then think it would be useful for the debtor to engage in a dialogue particularly with but not exclusively limited to those claimants who are represented by counsel for purposes of developing a set of procedures so that we can have a record here. I am not in a position to decide the matters before the Court without competent evidence. And at the moment, while I have suggestions as to what the facts may be, I do not have admissible evidence at this point. The evidence can be admissible by virtue of stipulations, declarations, depositions or perhaps a formal evidentiary hearing to be scheduled on notice.

To the extent that the parties wish an opportunity to further brief the issues in anticipation of that evidentiary hearing or that evidentiary submission, I'm going to request that the debtor take the lead in proposing a schedule for that. There'll be no need to repeat everything that has already been said. But I think there will be a need to deal with the specifics of what I heard today which, frankly, differs from some of what I've read in preparation for today.

With that, I'm going to adjourn today's hearing and go into my chambers conference. And I wish you all a good holiday.

(Whereupon these proceedings were concluded at 3:35 p.m.)

I N D E X

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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

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